6

No. 98-1101-CFX Title: Rohn F. Drye, Jr., et al., Petitioners
v.
United States

Docketed: January 11, 1999 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 16 1998	Petition for writ of certiorari filed. (Response due March 12, 1999)
	Feb 2 1999	Order extending time to file response to petition until March 12, 1999.
	Mar 10 1999	Brief of respondent United States in opposition filed.
	Mar 24 1999	DISTRIBUTED. April 16, 1999
	Apr 19 1999	Petition GRANTED. limited to the following question: "Whether the interest of an heir in an estate constitutes 'property' or a 'right to property' to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law." SET FOR ARGUMENT November 8, 1999. **********
	Jun 2 1999	Order extending time to file petitioners' brief on the merits and the joint appendix to and including June 4, 1999.
	Jun 4 1999	Joint appendix filed.
	Jun 4 1999	Brief of petitioners Rohn Drye et al. filed.
	Jul 9 1999	Brief of respondent United States filed.
	Sep 20 1999	Record filed.
	Sep 21 1999	Record filed.
	Sep 21 1999	CIRCULATED.
	Nov 8 1999	ARGUED.

Supreme Court, U.S.
FILED
98 11 01 NOV 16 1998
OFFICE OF THE CLERK

No _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROHN F. DRYE, JR., SUE C. DRYE, THERESA K. DRYE AND THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, TRUSTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel M. Traylor
Counsel of Record
Law Offices of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330
Attorneys for the Petitioners

QUESTION PRESENTED

1. Whether a federal tax lien can attach to a taxpayer's rights in a decedent's estate and thus support a levy and seizure where such rights are non-transferable, without pecuniary value, inchoate and unvested; an are not recognized nor enforceable, at law or in equity, under state law.

PARTIES TO THE PROCEEDING

The Drye Family 1995 Trust, Daniel M. Traylor, Trustee, was plaintiff and counter-defendant in the district court and appellant in the court of appeals. Petitioners Rohn F. Drye, Jr., Sue C. Drye, and Theresa K. Drye were counter-defendants in the district court and appellants in the court of appeals. Respondent United States of America was defendant and counter-plaintiff in the district court and appellee in the court of appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

A. Decisions of the Second And Eighth Circuits Are In Hopeless Conflict With Fifth And Ninth Circuit Decisions On The Vital Matters Of Succession Of Estates And Revenue Collection 5

B. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Present Balance Between Federalism Vs. States Rights Vs. Individual Rights 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Aquilino v. United States, 363 U.S. 509 (1960) 4, 6

Leggett v. United States, 120 F.3d 592 (5th Cir. 1988) 4, 5

Mapes v. United States, 15 F.3d 138 (9th Cir. 1994) 4, 5

United States v. Camparato, 22 F.3d 455 (2d Cir. 1994) 4, 5

United States v. Irvine, 511 U.S. 224 (1994) 6

United States v. Mitchell, 403 U.S. 190 (1971) 6

United States v. National Bank of Commerce, 472 U.S. 713 (1985) 4

Statutes

26 U.S.C. § 6321 4

26 U.S.C § 7426 3

28 U.S.C. § 1346(e) 3

Other Authorities

Uniform Disclaimer of Transfer by Will, Intestacy or Appointment Act, 8A U.C.A. 166, 1993 5

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 152 F.3d 892. The opinion of the district court (Pet. App. 19a-24a) is unpublished.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit was entered on August 17, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S. 1254.

STATUTES INVOLVED

26 U.S.C. § 6331(a)

Ark. Code Ann. § 28-2-101

Ark. Code Ann. § 28-2-102

Ark. Code Ann. § 28-2-108(a)

Ark. Code Ann. § 28-9-203

These provisions are set-forth at pages 30a-33a of the Petitioner's Appendix.

STATEMENT OF THE CASE

On March 13, 1923, petitioner Rohn F. Drye, Jr. was born of the marriage of Irma and Rohn Drye. One of his birthrights was the inchoate privilege to succeed to their intestate estates. Another birthright was the same privilege to renounce or disclaim such a succession. These birthrights are central to the case

In 1988, Mr. Drye suffered the involuntary liquidation of his engineering firm leaving him unable to pay federal income and withholding taxes totaling $240,000. The IRS promptly perfected a federal tax lien against all of Mr. Drye's property and rights to property pursuant to 26 U.S.C § 6321.

On August 3, 1994, his widowed mother Irma died intestate at her home in Pulaski County, Arkansas leaving an estate worth $236,000 of which $158,000 was personalty and $75,000 was the homestead. Irma was survived by her insolvent son and his daughter, petitioner Theresa K. Drye.

On August 17, 1994, Mr. Drye was appointed the personal representative and administrator of his mother's estate by the Pulaski County, Arkansas probate court. On February 4, 1995, Mr. Drye and his wife, petitioner Sue C. Drye, executed, delivered and filed of record a federal and state statutory disclaimer. On March 10, 1995, the probate court found that Mr. Drye had effected a valid disclaimer and ordered final distribution of the estate to Theresa K. Drye. The probate court found that Mr. Drye had no interest in his mother's estate under Arkansas law. Theresa then funded the petitioner spendthrift trust with her assets while granting to the trustee discretionary authority to provide for the health, maintenance and support of Mr. and Mrs. Drye during their lifetime.

Also in March, 1995, Mr. Drye approached the IRS to settle his tax liabilities during which he disclosed his beneficial interest in the trust. However, on April 11, 1996 and without notice, the IRS seized the trust's investment account containing $134,000 and filed of record a notice of federal tax lien against the trust's real estate, Irma's homestead.

On May 1, 1996, the trust filed a wrongful levy action alleging that the IRS had seized its assets without right to satisfy Mr. Drye's federal tax liabilities. Jurisdiction was predicated under 26 U.S.C. § 7426 and 28 U.S.C. § 1346(e). The government counterclaimed against the trust and its beneficiaries seeking, among other things, to confirm its right to seize the trust's personalty and to foreclose its alleged lien against the trust's real estate.

The trust and the government filed cross-motions for summary judgment. The district court granted the government's motion (Pet. App. 19a), and thereafter denied the trust's motion to reconsider its order (Pet. App. 25a).

On July 14, 1997 the district court entered judgment in favor of the government (Pet. App. 28a). It determined that Mr. Drye acquired vested rights to property in his mother's estate at the instant of her death, that federal tax liens attached thereto, and that Mr. Drye's disclaimer was fraudulent (Pet. App. 29a).

The petitioners appealed. A panel of the court of appeals affirmed the district court's judgment and issued its opinion on August 17, 1998 (Pet. App. 1a).

Judge McMillian, writing for the panel, framed the issue as "whether a taxpayer's disclaimer under state law has the legal effect of voiding state law interests in property such that the federal tax liens are incapable of attachment." (Pet. App. 5a).

The decision then reviewed IRC § 6321 and noted that it creates a lien in favor of the United States upon all property and rights to property belonging to any person who has neglected or refused to pay any tax (Pet. App. 6a).

The decision below acknowledged that state law controls in determining the nature of a legal interest which a taxpayer has in property. Aquilino v. United States, 363 U.S. 509, 513 (1960) but that whether a right created under state law constitutes property or rights to property is a matter of federal law. United States v. National Bank of Commerce, 472 U.S. 713, 727 (1985).

Judge McMillian then examined Arkansas state law and concluded that Mr. Drye had a vested right to inherit his mother's estate, that such right constituted property within the meaning of IRC § 6321, that the federal tax lien attached thereto, that the "relation back" provision of the disclaimer statute was a legal fiction incapable of defeasing a federal lien, and that the IRS seizure of the trust's assets was lawful.

The decision below noted that the Fifth and Ninth Circuits had reached an opposite conclusion on facts strikingly similar to those here, but reasoned that these cases were incorrectly decided. The cases are Leggett v. United States, 120 F.3d 592, (5th Cir. 1998) and Mapes v. United States, 15 F.3d 138, (9th Cir. 1994).

REASONS FOR GRANTING THE PETITION

A. Decisions Of The Second And Eighth Circuits Are In Hopeless Conflict With Fifth And Ninth Circuit Decisions On Vital Matters Of Succession Of Estates And Revenue Collection.

This case presents a question of national importance, which was resolved erroneously by the court of appeals. The case is important because the Arkansas probate code and its disclaimer statute are based on uniform acts that are similar to acts in other states (at least 35 by petitioner's count including Texas (Leggett) and Arizona (Mapes)). These states have adopted the acceptance-rejection theory of the succession of estates as opposed to the transfer theory.

The acceptance-rejection theory of disclaimer is adopted by the Uniform Disclaimer of Transfer by Will, Intestacy, or Appointment Act, 8A U.C.A. 166 (1993) and follows from the common law principle that a gift is a bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance. Here, Mr. Drye declined to accept his mother's estate and exercised his personal right of decision to disclaim. The decision below embraces the transfer theory, clearly not the law of the State of Arkansas. The decision below labels petitioners as parties to a fraudulent transfer, including unwittingly, the Arkansas probate court judge.

Now is the appropriate time for the Court to address this issue. The opinion below relied heavily on United States v. Comparato, 22 F.3d, 455, a 1994 second circuit decision that held a disclaimer was rendered ineffective by a federal tax lien. Comparato is easily distinguishable since the disclaimer there was filed more than seven years after the devisor's death but it illustrates the disparate treatment and conflict between the several circuits.

B. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Present Balance Between Federalism Vs. States Rights Vs. Individual Rights

This will be a case of first impression should the Court grant this petition, however from decisions in related cases the ruling below should be reversed. For example in United States v. Irvine, 511 U.S. 224, 239-40 (1994) the Court recognized that the right to disclaim might, under state law, be based on the acceptance-rejection theory, and therefore, not be a legal fiction. The decision below rejects the Court's advise on this critical issue.

Moreover, the decision below has the effect of gutting Aquilino and United States v. Mitchell, 403 U.S. 190 (1971) which teach that an in-depth analysis should be made of state law to ascertain IRC § 6321 property and rights to property. The decision below has a state law analysis that is shallow and cursory at best, and effectively strips the states of their traditional power to define property rights.

Pealed to their core, Mr. Drye's disclaimer was either a fraudulent transfer or the lawful exercise of a personal right of decision. Can a person be made an owner without his consent? Only this Court can settle the issue.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

Daniel M. Traylor
Counsel of Record
Law Offices of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330

Attorneys for the Petitioners
November 16, 1998

APPENDIX

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Filed August 17, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Granting Motion For Summary Judgment Dated And Filed February 25, 1997 ..... 19a

Appendix C — Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Denying Petitioner's Motion For Reconsideration Dated And Filed April 4, 1997 ..... 25a

Appendix D — Judgment Of The United States District Court For The Eastern District Of Arkansas, Western Division Dated July 14, 1997 ..... 28a

Appendix E — Relevant Statutes 30a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 17, 1998

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3249

Drye Family 1995 Trust;
Daniel M. Traylor, Trustee,

Appellants,

v.

United States of America,

Appellee.

United States of America,

Appellee,

v.

Drye Family 1995 Trust; Daniel M. Traylor; Rohn F. Drye; Sue C. Drye, Theresa K. Drye,

Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: April 15, 1998
Filed: August 17, 1998

Before BOWMAN[1], Chief Judge, and McMILLIAN and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

The Drye Family 1995 Trust, Daniel M. Traylor, Rohn F. Drye, Jr., Sue C. Drye, and Theresa K. Drye (collectively, appellants) appeal from a final judgment entered in the United States District Court[2] for the Eastern District of Arkansas in favor of the United States of America (hereinafter, the government) on its counterclaim to reduce certain tax assessments to judgment. *Drye Family 1995 Trust v. United States*, No. LR-C-96-346 (E.D. Ark. July 14, 1997) (judgment). For reversal, appellants contend that the district court erred in failing to hold that a taxpayer's disclaimer under Arkansas law has the legal effect of voiding interests created under Arkansas law such that federal tax liens are incapable of attachment. For the reasons discussed herein, we affirm.

Jurisdiction

The district court had jurisdiction over the underlying wrongful levy action pursuant to 26 U.S.C. § 7426, which waives sovereign immunity to allow such suits, and 28 U.S.C. § 1346(e), which grants subject matter jurisdiction over such suits. The district court also had jurisdiction over the government's counterclaim pursuant to 26 U.S.C. § 7402(a) and 28 U.S.C. §§ 1340, 1346(c). Jurisdiction on appeal is proper under 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure.

---

1. The Honorable Pasco M. Bowman succeeded the Honorable Richard S. Arnold as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998.

2. The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

Facts

The relevant facts are undisputed. On August 3, 1994, Irma Deliah Drye died intestate at her home in Pulaski County, Arkansas, leaving an estate worth approximately $236,000.00, of which $158,000.00 was personalty and $75,000.00 was realty located in Pulaski County, Arkansas. Ms. Drye was survived by her son and sole heir-at-law, Rohn F. Drye, Jr. (Drye), and his daughter, Theresa K. Drye. On the date of his mother's death, Drye was insolvent and owed the government approximately $325,000.00 representing assessments for tax years 1988, 1989, and 1990. The Internal Revenue Service (IRS) had made assessments against Drye in November 1990 and May 1991 and had valid tax liens against all of Drye's property or rights to property pursuant to 26 U.S.C. §§ 6321 and 6322 of the Internal Revenue Code (the Code).

On August 17, 1994, Drye was appointed the Personal Representative and Administrator of his mother's estate in Pulaski County Probate No. 94-1440. Drye resigned from that position on February 6, 1995. Before resigning, Drye filed in the probate court and the land records of Pulaski County an instrument dated February 4, 1995, entitled "Disclaimer and Consent" to disclaim all interests in his mother's estate.[3] Also, on or about February 4, 1995, Theresa Drye created The Drye Family 1995 Trust (the Trust). Theresa Drye was appointed Successor Personal Representative and Administratrix of Irma Deliah Drye's estate on February 8, 1995.

On March 10, 1995, the Probate Court found that Drye had effected a valid disclaimer of his mother's estate under Arkansas law and ordered final distribution of the estate to Theresa Drye. Theresa Drye then funded the Trust with her

---

3. Pursuant to Ark. Code Ann. § 28-2-109(b), Sue C. Drye, Drye's wife, joined in the election of the disclaimer in order to consent to the disclaiming of any dower or homestead interests that she might have had.

interest in the estate. The Trust's beneficiaries are Theresa Drye and, during their lifetimes, Drye and his wife, Sue C. Drye. Pursuant to the terms of the Trust, distributions are at the discretion of the trustee, Daniel M. Traylor, and may be made only for the health, maintenance, and support of the beneficiaries. The Trust is spendthrift and, therefore, its assets cannot be attached by state law creditors to satisfy the debts of its beneficiaries.

On April 18, 1995, the Trust opened an investment account at Stephens, Inc., an investment banking organization which managed the account in the name of the Trust. Also in 1995, Drye began negotiations with the IRS regarding his tax liabilities during the course of which he revealed his beneficial interest in the Trust. On April 11, 1996, the IRS filed in the office of the Pulaski County, Arkansas, Circuit Clerk and Recorder a Form 668 Notice of Federal Tax Lien against the Trust as Drye's nominee and, subsequently, served a Notice of Levy on Stephens, Inc. and notified the Trust of the levy.

The Trust brought the underlying wrongful levy action on May 1, 1996, alleging that the IRS had unlawfully levied its property to satisfy Drye's federal tax liabilities and seeking, among other things, injunctive relief. On May 2, 1996, Stephens, Inc. paid over to the IRS $134,004.33 representing the account's proceeds. On June 28, 1996, the government filed a counterclaim against the Trust, the trustee, and the trust beneficiaries seeking, among other things, to reduce to judgment the tax assessments against Drye, confirm its right to seize the Trust's assets in collection of those debts, foreclose on its liens and sell the Trust property. The Trust and the government filed cross-motions for summary judgment.[4] The district court

4. On or about January 17, 1997, the Trust served on the government a motion for summary judgment but inadvertently omitted to file that motion with the district court. The district court later granted the Trust's motion to accept the filing of the motion for summary judgment pursuant to Fed. R. Civ. P. 60(b).

the government's motion for summary judgment, *id.* at 6 (Feb. 25, 1997), and thereafter denied Drye's motion to reconsider its order. *Id.* at 2 (April 4, 1997).

On July 14, 1997, the district court entered final judgment in favor of the government and against the Trust and the counterclaim defendants. In addition, that judgment (1) dismissed with prejudice the complaint of the Trust and the trustee; (2) reduced to judgment assessments against Drye for $220,980.00, plus statutory interest, for the last quarters of 1988 and 1989 and the first quarter of 1990, and assessments against Drye for $91,952.00, plus statutory additions to tax, for 1988; (3) determined that the government had valid tax liens against all of Drye's property and rights to property including the personalty and realty conveyed in the estate (particularly the funds seized by levy from Stephen's, Inc., and the real property in Pulaski County); (4) determined that Drye's disclaimer was invalid, null, and void, and fraudulent against the United States, and that the Trust was merely Drye's nominee or alter ego; and (5) ordered the foreclosure of the federal tax liens, the sale of the real property, and the application of the sale proceeds and of the funds seized by levy in satisfaction of the assessments against Drye. *Id.* at 1-3 (July 14, 1997) (judgment). This appeal followed.

Discussion

This appeal presents a narrow, but not uncomplicated, legal issue that conjoins state laws of inheritance and federal tax law, and one that has fomented a split among three federal courts of appeal.[5] The issue is whether a taxpayer's disclaimer under state law has the legal effect of voiding state law interests in property such that federal tax liens are incapable of attachment. The law of Arkansas is the applicable state law in the instant

5. *Leggett v. United States*, 120 F.3d 592, 598 (5th Cir. 1997) (state law disclaimer of right to accept or reject property defeated attachment of federal tax liens); *United States v. Comparato*, 22 F.3d 455 (2d Cir. 1994) (state law disclaimer ineffective against federal tax liens); *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994) (state law disclaimer defeated attachment of federal tax liens).

case. We review *de novo* the district court's interpretation and application of both federal and state law. *Norwest Bank North Dakota, N.A. v. Doth*, No. 97-3113, 1998 WL 432471, at *4 (8th Cir. July 31, 1988) (federal law); *Salve Regina College v. Russell*, 499 U.S. 231 (1991) (state law); *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1267 (8th Cir. 1997) (same).

Section 6321 of the Internal Revenue Code creates a lien in favor of the United States upon *all property and rights to property*, whether real or personal, belonging to any person who has neglected or refused to pay any tax (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) after demand has been made. 26 U.S.C. § 6321. " '[S]tate law controls in determining the nature of the legal interest which the taxpayer had in the property.' " *Aquilino v. United States*, 363 U.S. 509, 513 (1960) (*Aquilino*) (quoting *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940)). However, whether a right or interest created under state law "constitutes 'property' or 'rights to property' is a matter of federal law." *United States v. National Bank of Commerce*, 472 U.S. 713, 727 (1985) (*Bank of Commerce*) (citing United States v. Bess, 357 U.S. 51, 56-57 (1958) (*Bess*)). " '[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [§ 6321], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *Bank of Commerce*, 472 U.S. at 722 (quoting *Bess*, 357 U.S. at 56- 57); *see also United States v. Mitchell*, 403 U.S. 190, 197 (1971) (*Mitchell*) ("[S]tate law creates legal interests but the federal statute determines when and how they shall be taxed.") (emphasis added) (citations omitted); *United States v. Solheim*, 953 F.2d 379, 382 (8th Cir. 1992) (*Solheim*) ("Once the tax lien has attached to the taxpayer's state-created interest, federal law applies.") (citing *Aquilino*, 363 U.S. at 513-14)). This bifurcated application of state and federal law derives from the fact that the federal statute "creates no property rights

but merely attaches consequences, federally defined, to rights created under state law." *Bess*, 357 U.S. at 55 (holding in bankruptcy context that state law that "[an] insured's property right represented by the cash surrender value [of a life insurance policy] is not subject to creditors' liens' was irrelevant" to whether federal tax lien could attach).

The Code does not define "property" or "rights to property" as those terms are used in § 6321. The Supreme Court has held that Congress's language with respect to those terms "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. . . . 'Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.' " *Bank of Commerce*, 472 U.S. at 719-20 (quoting *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945)) (other citations omitted). *But cf. Leggett v. United States*, 120 F.3d 592, 598 (5th Cir. 1997) (*Leggett*) (suggesting that Congress's failure to define property more broadly than state law does (as is the case in the gift tax provisions of the Code) or to expressly prohibit taxpayers from filing disclaimers precludes an expansive reading of § 6321). In enforcing § 6321, appellate courts have interpreted "property" or "rights to property" to mean state-law rights or interests that have pecuniary value and are transferable. *See, e.g., United v. Stonehill*, 83 F.3d 1156, 1159-60 (9th Cir.) (Stonehill) (holding that a chose-in-action is "property" or a "right to property" under § 6321 in light of its pecuniary value and transferability), *cert. denied*, 117 S. Ct. 480 (1996); *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992) (Kimura) (holding that liquor license is subject to § 6321 lien because it has independent value and sufficient transferability); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-72 (6th Cir. 1990) (*Terwilliger's Catering Plus*) (same); *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354, 357-58 (3d Cir. 1986) (*21 West Lancaster Corp.*) (noting that federal tax lien may attach to liquor license because license has value and transferability, notwithstanding fact that, under

state law, license is not property or subject to a security interest); *Southern Bank v. IRS*, 770 F.2d 1001, 1005 (11th Cir. 1985) (*Southern Bank*) (holding that an equitable right of redemption constitutes "property" or "right to property" under § 6321 because it has pecuniary value and is transferable).

Under Arkansas law the right to inherit has pecuniary value, *see, e.g., Bransford v. Jones*, 679 S.W.2d 798, 799 (Ark. 1984) (holding that heirs to intestate part of residual portion of estate who were also specific legatees to a bequest had a right to post-judgment interest on intestate share), and is transferable. *See Clark v. Rutherford*, 298 S.W.2d 327, 330 (Ark. 1957) (upholding conveyance, through assignment, of expectancy in mother's estate); *Hutchison v. Sheppard*, 279 S.W.2d 33, 38 (Ark. 1955) (recognizing conveyance of an "entire interest" in land irrespective of whether heir had received by will or by intestacy a share in the reversionary estate or whether conveyance preceded decedent's death); *Bradley Lumber Co. v. Burbridge*, 210 S.W.2d 284, 288 (Ark. 1948) (reasserting that, although unenforceable at law, assignments of expectancies by prospective heirs have generally been upheld in courts of equity); *Leggett v. Martin*, 156 S.W.2d 71, 74-75 (Ark. 1941) (holding that expectant heirs may release to an ancestor for adequate consideration their anticipated interests in that ancestor's estate); *Felton v. Brown*, 145 S.W. 552, 554 (Ark. 1912) (same). The Arkansas Probate Code provides that an heir may disclaim, in whole or in part, an intestate interest in or right to a heritable estate within nine months of the decedent's death. Ark. Code Ann. §§ 28-2-101 & 28-2-107(a)(1). The Arkansas Probate Code further provides that a disclaimer effected under these provisions creates the legal fiction that the disclaimant predeceased the decedent and "relates back for all purposes to the date of death of the decedent." *Id.* § 28-2-108(a)(1) & (3) (emphasis added).

Appellants contend that, in light of Drye's legally valid disclaimer, Drye never had a property interest in his mother's

estate to which federal liens could attach. Specifically, appellants argue that the "relation back" provision in the disclaimer statute has the effect of completely nullifying any state law right to intestate succession that Drye might once have had. Appellants urge this court either to reverse the district court's denial of their motion for summary judgment in favor of the government or to certify to the Arkansas Supreme Court the question of what effect, if any, the "relation back" doctrine has on federal tax liens.

The government maintains that the federal tax liens attached to Drye's interest in his mother's estate on the date of her death and that the subsequent disclaimer was ineffective to remove them. The government further argues that, because Drye's right to intestate succession has pecuniary value and is transferable, it constitutes "property" or "rights to property" under § 6321 and was automatically subject to attachment by the preexisting federal tax liens. In addition, the government argues that the transfer of the estate's assets to the Trust constitutes a fraudulent conveyance because the Trust is Drye's nominee or alter ego.[6]

The Second, Ninth, and Fifth Circuits addressed similar arguments in determining the effect of a state law disclaimer on preexisting federal tax liens and reached differing results. In *Leggett*, the most recent case, the Fifth Circuit determined that a disclaimer under Texas law nullifies any interest that the disclaimant has in the property, thereby defeating the attachment of federal tax liens. 120 F.3d at 596. As in the instant case, the IRS had made assessments against a taxpayer and acquired a lien against all of her property and rights to property pursuant to § 6321 when her aunt died testate, leaving the taxpayer a one-twentieth interest in her estate. *Id.* at 593. The taxpayer subsequently disclaimed her entire interest in the estate pursuant to Texas's disclaimer statute and sought a declaration

6. The government briefed this issue below but the district court did not reach it.

that the IRS had no lien against the estate's property in view of the disclaimer. *Id.* The district court ruled in favor of the IRS on the ground that Texas law creates only a right to accept or reject inheritance; that is, the taxpayer merely had a right of decision which does not constitute a property right under state law. *Id.* at 596. The Fifth Circuit reversed, applying Texas law to determine whether the state-law right constituted "property or rights to property" under § 6321. *Id.* at 594 ("[S]tate law determines whether a taxpayer has a property interest to which a federal lien may attach. . . . Therefore, we must decide whether, under Texas law, [the taxpayer] ever had a property interest in [the subject] estate.") (citations omitted). Reading the Texas Probate Code's vesting and disclaimer provisions together, the Fifth Circuit concluded that " 'a bequest or gift is nothing more than an offer which can be accepted [by taking possession, exercising dominion, or taking no action within the set time] or rejected [by timely filing a disclaimer].' " *Id.* at 595-96 (citing Texas authority). Furthermore, the Fifth Circuit distinguished its holding from a contrary holding in *United States v. Comparato*, 22 F.3d 455 (2d Cir. 1994) (Comparato), on the ground that New York law is substantially different from Texas law and from Arizona law, which was applied in *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994) (*Mapes*). *Leggett*, 120 F.3d at 596-97.

In *Mapes*, the taxpayer's mother died, leaving him half of her estate. 15 F.3d at 139. In order to prevent preexisting federal tax liens from attaching to his interest in the estate, the taxpayer renounced his interest in favor of his children pursuant to Arizona's Probate Code.[7] *Id.* at 140. The district court's ruled in favor of the government and against the taxpayer's children in their wrongful levy action. *Id.* at 141. The Ninth Circuit reversed, holding that "state law, not federal law" determined

7. Like the Arkansas Probate Code's disclaimer provisions, the disclaimer provisions of the Arizona Probate Code have not been interpreted in a reported Arizona State Court opinion or federal court opinion.

"whether [the taxpayer] had any interest in property, lienable or not." *Id.* at 140. From this premise, the court concluded that the taxpayer did not have an interest under state law because the effect of the taxpayer's proper and timely renunciation was to prevent him from acquiring any interest to which a federal tax lien could have attached. *Id.* at 140-41. The court further held that the taxpayer's renunciation was not compromised by his temporary use of part of the estate (a vehicle, constituting one percent of the value of the estate) in order to prevent its loss or theft. *Id.* at 141.

As noted above, the Second Circuit reached a contrary result in *Comparato*. *Comparato* involved the estate of a quadriplegic who died intestate in 1984, leaving his parents, the Comparatos, as his statutory distributees. 22 F.3d at 456. In 1989 Anthony Comparato, the decedent's father, petitioned the Surrogate's Court to approve the settlement of a malpractice action that decedent had commenced before his death and a derivative wrongful death claim, and to distribute the proceeds equally between himself and his wife as the decedent's heirs. *Id.* In August 1989, before the Surrogate Court disposed of the petition, the IRS served notice of levy on the decedent's estate in the amount of the Comparatos' tax liability. *Id.* The Comparatos executed separate, untimely renunciations of their respective interests in their son's estate on April 10, 1991, which the Surrogate Court permitted them to file on September 23, 1991. *Id.* In 1992 the government commenced an action in the district court to reduce to judgment the assessments against the Comparatos. *Id.* The district court held that the Comparatos acquired property interests in the proceeds of the malpractice claims on the date of their son's death and that the preexisting federal tax liens attached to the interests prior to the Comparatos' renunciation. *Id.* at 458. The Second Circuit affirmed, holding that, under New York law, the Comparatos' interests vested upon their son's death, thereby obviating any analysis of the retroactive effect of the renunciation. *Id.* at 457-58. "[O]nce state law provided [the Comparatos] with a vested

interest in the proceeds of the malpractice actions, federal law controlled whether their interests were exempt from levy by the United States." *Id.* at 458 (citing *United States v. Rodgers*, 461 U.S. 677, 683 (1983)). Applying federal law, the court further determined that the express terms of the Code precluded any determination that the Comparatos' interests were exempt from levy by operation of a state law. *Id.* (citing 26 U.S.C. § 6334).

We agree with the conclusion reached in *Comparato*.[8] The central question undergirding each circuit court's analysis is what law applies: Is a federal court bound by state law governing disclaimers and the "relation back" thereof or does federal law governing the attachment of liens apply? *Leggett* concludes that "state law determines whether a taxpayer has a property interest to which a federal lien may attach." *See Leggett*, 120 F.3d at 594. Similarly, *Mapes* holds that state law concerning property interests and disclaimers determine whether a taxpayer has "property" or a "right to property." *Mapes*, 15 F.3d at 140. However, as we noted earlier, the Supreme Court has pronounced that "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," *Bess*, 357 U.S. at 56-57, and that "[w]hether a state-law right constitutes 'property' or 'rights to property' *is a matter of federal law*.' " *Bank of Commerce*, 472 U.S. at 727 (emphasis added). The principle that emerges from these seemingly contradictory statements is that state law determines whether a given set of circumstances creates a right or interest; federal

8. *Comparato* appears to be factually distinguishable from the instant case because the Comparatos disclaimed their vested interest in the proceedings approximately seven years after the disclaimer period. However, the timeliness of the disclaimer did not drive the court's decision in *Comparato*. Rather, the court relied mainly on the fact that Congress did not specifically exempt from § 6321 levy property that state law has made exempt from state levy. *See United States v. Comparato*, 22 F.3d 455, 458 (2d Cir. 1994).

law then dictates whether that right or interest constitutes "property" or the "right to property" under § 6321. The concomitant state law consequences of a state law interest or right "are of no concern to the operation of the federal tax law." *Id.* at 723.

By extension, we hold that the state law consequences of Drye's right to his mother's estate, namely, the legal fiction that is created through Drye's disclaimer under Ark. Stat. Ann. § 28-2- 101 *et seq.*, is "of no concern to the operation of the federal tax law." *Cf. Bess*, 357 U.S. at 57 ("Such state laws 'are not laws for the United States . . . unless they have been made such by Congress itself.' ") (quoting *Fink v. O'Neil*, 106 U.S. 272, 276 (1882) (concerning bankruptcy liens)); *Leggett*, 120 F.3d at 596 ("The view that the disclaimer is a legal fiction . . . supports the holding that property right existed before the disclaimer."); *Terwilliger's Catering Plus*, 911 F.2d at 1171-72 ("Although it is true that the state has the right to decide what property interests it wishes to create, it cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights."). Under this view, we conclude that the preexisting federal tax liens attached to Drye's state law right to his intestate share which vested on or about the time of his mother's death. *See, e.g., Keenan v. Peevy*, 590 S.W.2d 259, 269-70 (Ark. 1979) (holding that the title to real property vests immediately upon death of owner if heirs take through intestate succession, subject to appropriate provisions for administration under the probate code and subject to widow's dower and homestead rights, if any); *Dean v. Brown*, 227 S.W.2d 623, 628 (1950) (deciding under prior law that the personalty of an intestate became vested in the personal representative when appointed and remained so vested until distribution upon proper order of the probate court); *see also* Ark. Stat. Ann. § 28-9-203(c) ("Real estate passes immediately to the heirs upon the death of the intestate . . . . However, personalty will pass to the personal representative, if any, for distribution to the heirs . . . .").

Appellants suggest that Drye cannot be forced to "accept" his share of the estate. Brief of Appellants at 4. We disagree. Although the Arkansas disclaimer statute provides that "an *acceptance* of the property or interest of a benefit thereunder" constitutes a bar to the right to disclaim property or an interest in property, Ark. Code. Ann. § 28-2-102, (thereby supporting inferentially appellants' argument), we conclude that "acceptance" in this context is a term of art particular to the issue of state law disclaimer which we have already rejected as irrelevant to our analysis. *But see Leggett*, 120 F.3d at 595-97; *cf. Mapes*, 15 F.3d at 141 (holding that the taxpayer's use of the estate's property prior to disclaimer was *de minimis* and thus did not constitute acceptance of benefits from the property). In actuality, if Drye did nothing, he still had an interest in the estate as the sole heir-at-law. Subject to the administration of the estate, that interest is enforceable and transferable upon the death of Irma Deliah Drye and, more important, during the nine-month disclaimer period. Moreover, it is the existence of Drye's right to a share of his mother's estate that allowed him the right under state law to disclaim the estate; in other words, Drye's mere ability to invoke a legal fiction under state law that has the effect of redirecting the succession of the estate reifies his state law interest in the estate. Unfortunately for Drye, our inquiry regarding his rights under state law terminates upon identifying this elementary interest. The "relation back" of Drye's disclaimer is therefore of no effect to our analysis.

As a matter of federal law, Drye's state law right to inherit his mother's estate is a "right to property" under § 6321 because that right has pecuniary value (the estate was valued at approximately $233,000 minus administrative expenses) and is transferable. *See, e.g., Stonehill*, 83 F.3d at 1159-60; *Kimura*, 969 F.2d at 810; *Terwilliger's Catering Plus*, 911 F.2d at 1171-72; *21 West Lancaster Corp.*, 790 F.2d at 357-58; *Southern Bank*, 770 F.2d at 1005. In light of the foregoing, we hold that Drye's state law interest in the estate of his mother is subject to the "federal consequence" of the preexisting tax liens, irrespective of Drye's subsequent disclaimer of that interest under state law.

To be sure, there are policy considerations that arguably militate in favor of an opposite result. In *Leggett*, the Fifth Circuit provided a thoughtful analysis of some of these considerations. At common law, beneficiaries could accept or reject a legacy or devise on the theory that no person can be made an owner without his or her consent; heirs could not. *Leggett*, 120 F.3d at 595-96. We agree with the Fifth Circuit's conclusion that the purpose of disclaimer law is to rectify the disparate tax treatment that resulted from this distinction whereby disclaiming beneficiaries were not subject to gift tax liability while disclaiming heirs were. *See id.* However, under the Fifth Circuit's reasoning, limiting the application of state law disclaimers to state tax liability goes against the spirit and purpose of disclaimer laws. We find, however, that the Supreme Court's instruction that "state-law consequences of [a state-law defined interest] are of no concern to the operation of the federal tax law" and its express limitation of the role of state law in determining federal tax liability under § 6321 counsel against interpreting broadly the scope of state disclaimer laws. State disclaimer statutes may fulfill their intended purpose with respect to state tax liability but cannot affect federal tax consequences.

Furthermore, holding that state law disclaimers can defeat federal tax liability ignores the clear intent of Congress embodied in the broad scope of § 6321. The purpose of § 6321 is to reach any and all interests of pecuniary value to which a taxpayer may be entitled in order to satisfy outstanding tax liability. It follows, therefore, that Congress did not intend that taxpayers have the prerogative to relinquish rights in property in favor of avoiding tax liability. *See Bank of Commerce*, 472 U.S. at 723-25 (holding that "[c]ommon sense dictates" that taxpayer's unqualified, unrestricted, and absolute right under state law and his bank contract to compel payment of outstanding balances in two accounts constitutes property [or] rights to property under §§ 6331 and 6332); *United States v. First Nat'l Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970) ("[I]t

is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer[].") (quoted in *Bank of Commerce*, 472 U.S. at 726); cf. *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1302 (8th Cir. 1980) ("The unqualified contractual right to receive property is itself a property right subject to seizure by [§ 6321] levy, even though the right to payment of the installments has not matured at the time of the levy.").

Section 6334 of the Internal Revenue Code also convinces us of Congress's intention to reach property and rights to property disclaimed under state law. Section 6334 specifically exempts certain property or rights to property from the ambit of the Code's levy provisions. 26 U.S.C. § 6334(a). Property or rights to property disclaimed under state law are not included in the list of exempt property. Subsection (c) expressly provides that the list is exhaustive. *Id.* § 6334(c) ("[N]o property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."); *see also Mitchell*, 403 U.S. at 205 (holding that § 6334(c) is specific and clear and provides "no room . . . for automatic exemption of property that happens to be exempt from state levy under state law"); *Comparato*, 22 F.3d at 458 (relying on exhaustive list of exempt property in § 6334(a) as evidence of Congress's intent not to exempt property taxpayers renounced under state law). Accordingly, Congress's failure to exclude property exempt from levy under state law is indicative of its intention that such property be subject to federal levy. *Cf. In re Detlefsen*, 610 F.2d 512, 515 (8th Cir. 1979) (*Detlefsen*) (holding that under § 70(a) of the old Bankruptcy Act, a post-petition state law disclaimer defeated federal liens, but recognizing that the more expansive language anticipated in the new bankruptcy code would obviate this question by expanding the definition of property and thus the scope of federal liens); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 Loy. U. Chi. L.J. 31, 37-39 (1993) (discussing

Detlefsen and noting that courts that have reviewed the same issue under the new bankruptcy code "have in fact reached the different result referred to by the Detlefsen court"). Finally, we would be remiss in setting forth our analysis, if we failed to note that Drye's retention of a life estate in the Trust, which was funded in large part if not entirely by the disclaimed property, gives us considerable pause.

Considered in their totality, these factors clearly outweigh, and obviate consideration of, the goal of state disclaimer statutes to equalize the gift tax consequences between intestate and probate heirs. Thus, having determined that Drye's right to his intestate share of his mother's estate is property or a right to property within the meaning of § 6321 and assuming for purposes of analysis that Drye's disclaimer was properly executed under Arkansas law, we further conclude that the only relevant legal effect of Drye's disclaimer is to direct the proceeds of the estate to his daughter subject to the federal liens. The liens pass *cum onere* with the estate until they are satisfied or become unenforceable. *See* 26 U.S.C. § 6322 (unless otherwise provided by law, a lien imposed by § 6321 arises at the time of assessment and continues until the liability for the assessed amount "(or judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time"); *cf. Bess*, 357 U.S. at 57 (referring to liens under bankruptcy code). The liens are, therefore, enforceable against the Trust and the trust beneficiaries to the extent that they are heretofore unpaid.

Conclusion

Peeled to their core, Drye's efforts to bind the IRS by the legal fiction created under Arkansas's disclaimer statute were unfruitful. For the reasons stated in this opinion, we affirm the judgment of the district court granting summary judgment in favor of the government and denying appellants' motion for

summary judgment. In light of the foregoing, we do not reach the government's argument that the disclaimer effected a fraudulent conveyance.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION GRANTING MOTION FOR SUMMARY JUDGMENT DATED AND FILED FEBRUARY 25, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-96-346

THE DRYE FAMILY 1995 TRUST and
DANIEL M. TRAYLOR, Trustee

PLAINTIFFS

v.

THE UNITED STATES OF AMERICA

DEFENDANT/ COUNTERCLAIM PLAINTIFF

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, as Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE

COUNTERCLAIM DEFENDANTS

ORDER

On January 29th, the United States filed a motion for summary judgment supported by brief, a statement of facts and exhibits. Plaintiffs have not responded.

Appendix B

Summary judgment can properly be entered when there are no genuine facts that can be resoived by a finder of fact; that is, there are no facts which could reasonably be resolved in favor of either party. The Court must, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512 (1.986). The non-moving party may not just rest upon his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); Civil Procedure Rule 56. "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law." *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989).

Local Rule C-10 provides that a party moving for summary judgment must file a separate, short and concise statement of material facts as to which it contends there is no genuine issue to be tried. The rule further provides that unless the non-moving party files a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried, all material facts set forth in the moving party's statement will be deemed admitted.

The following facts are admitted:

1. On the dates and in the amounts listed below, a duly authorized delegate of the Secretary of the Treasury, in accordance with law, timely assessed federal income taxes and trust fund recovery penalties (TFRP), plus additions to tax and statutory interest against the taxpayer as follows:

Appendix B

Type of Tax	Period	Assessment Date	Amount	Lien Date Notice
TFRP	8812	11/26/90	$ 25,799	3/25/91
TFRP	8912	11/05/90	188,480	3/25/91
TFRP	9003	11/26/90	6,701	3/25/91
Income	8812	05/01/91	91,952	1/28/92

2. Notices of the assessments described in paragraph 1 were sent to the taxpayer by a delegate of the Secretary of the Treasury in accordance with law.

3. Despite notice and demand, the taxpayer has refused or neglected to pay the full amount of the assessments penalty described in paragraph 1.

4. Notices of federal tax lien have been filed with the Pulaski County Recorder relative to the assessments described in paragraph 1, in the name of The Drye Family 1995 Trust as the nominee of Rohn F. Drye, Jr.

5. On August 3, 1994, the taxpayer's mother, Irma Deliah Drye ("Decedent"), died intestate.

6. Decedent was survived by the taxpayer and his daughter, Theresa K. Drye ("Theresa Drye").

7. The taxpayer was appointed Personal Representative and Administrator of the decedent's estate.

8. On February 6, 1995, the taxpayer filed a "Disclaimer and Consent" by which he purported to disclaim any interest in the Decent's estate, purporting to leave Theresa Drye as the sole heir of the estate and all property included therein, including the personal property seized by IRS levy and the real property more fully described in paragraph 9.

9. The real property which is the subject matter of this action is located in Pulaski County, Arkansas, within the jurisdiction of this Court and is more-particularly described as follows:

> The W1/2 of the SW1/4 of the SE1/4 of the SW1/4, Section 31, Township 3 north, Range 11 West, less and except the North 3 acres thereof.

10. The disclaimer was made without adequate consideration.

11. At the time the taxpayer executed the purported disclaimer he was insolvent.

12. At the time of the disclaimer and purported transfer of the subject property to the Drye 1995 Family Trust, the tax liabilities referred to in paragraph 10 above, were due and owing to the United States, had been assessed, and notice of federal tax liens had been filed. Accordingly, the disclaimer and transfer were made subject to the pre-existing tax liens.

13. On February 6, 1995, the taxpayer resigned as personal Representative and Administrator of the decedent's estate.

14. By order dated February 8, 1995, Theresa Drye was appointed Successor Personal Representative and Administratrix.

15. On or about February 4, 1995, Theresa Drye purported to convey the estate property to the Drye Family 1995 Trust.

16. The beneficiaries of the trust are the taxpayer, the taxpayer's wife, Sue. C. Drye, and Theresa Drye.

17. The trustee of the Drye Family 1995 Trust is Daniel M. Traylor.

18. On April 11, 1996, the Internal Revenue Service served a Notice of Levy on Stephens, Inc. in order to collect the unpaid Trust Fund Recovery Penalty and individual federal income tax liabilities of Rohn F. Drye, Jr.

19. Stephens, Inc. is an investment banking organization, which managed an investment account in the name of the trust.

20. On May 2, 1996, Stephens, Inc. paid over $134,004.33 to the IRS.

21. On May 1, 1996, the plaintiffs filed suit against the United States alleging that the IRS had wrongfully levied on the funds held by Stephens and requesting that this Court release the federal tax lien filed against the Drye Family Homestead.

22. On June 28, 1996, the United States filed an answer and counterclaim denying the plaintiffs' allegations and requesting that this Court foreclose the federal tax liens against the real and personal property and order a sale of said property.

The United States has correctly applied the relevant law in establishing that taxpayer Drye obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens properly attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens. See, *United States v. Comparato*, 22 F.3d 455 (2nd Cir. 1994); *Estate of Leggett v. United States*, 1996 WL 604485, 78 A.F.T.R.2d 96-6334 (S.D. Tex. 1996); *Tinari v. United States*, 78 A.F.T.R.2d 96-63 81 (E.D. Penn. 1996).

Hence, the United states properly levied against the personalty at issue and is entitled to foreclose its lien against the real property at issue. Plaintiffs are not entitled to any relief.

Accordingly, the United States, January 29th motion for summary judgment (#6) is granted. The United States is directed

Appendix B

to submit a precedent for judgment granting the relief requested by the counterclaim within 20 days of the file-date of this order.

IT IS SO ORDERED this 25 day of February, 1997.

s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DENYING PETITIONER'S MOTION FOR RECONSIDERATION DATED AND FILED APRIL 4, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-96-346

THE DRYE FAMILY 1995 TRUST, and
DANIEL M. TRAYLOR, Trustee

PLAINTIFFS

v.

THE UNITED STATES OF AMERICA -

DEFENDANT/COUNTERCLAIM PLAINTIFF

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE

COUNTERCLAIM DEFENDANTS

ORDER

By order filed on February 25th, the Court granted summary judgment in favor of the United States and directed that a precedent for judgment in accordance with that order be submitted. On March 18th, plaintiff filed a motion for relief

pursuant to Civil Procedure Rule 60(h) on the ground that while a motion for summary judgment had been prepared and served on defendant on January 17th, the original was inadvertently not filed with the Clerk. Plaintiff agrees that the facts contained in Paragraphs 1 through 22 of that order are admitted, but asserts that the "relation back" of the Arkansas disclaimer law prevented Rohn from acquiring any interest — the defeasible fee simple interest with respect to the real property and an expectancy interest with respect to personalty — in his mother's estate so the levy was wrongful. Plaintiff requests the Court to accept the summary judgment motion attached to the motion for filing and for reconsideration of the February 25th order. On March 27th, plaintiff and counterclaim defendants filed a notice of appeal from the February 25th order that was entered on the docket on February 26th.

The Court finds that plaintiff has demonstrated inadvertence under Rule 60(b) and so will treat plaintiff's summary judgment motion as filed. The Court has reconsidered the February 25th order in light of plaintiff's submission and finds that the United States is still entitled to summary judgment.

While plaintiff correctly sets out that Arkansas law is used to determine the legal interest Rohn had in the property against which the tax lien is attached, federal law governs when the tax liens attached. As explained by the cited cases in the February 25th order, a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens.

Hurt v. United States, 566 F.Supp. 356 (E.D. Ark. 1983), relied upon by plaintiff to illustrate that this Court has employed the "relation back doctrine," involved the effect of disclaimers of the surviving children and the children of a deceased child for purposes of a martial deduction to the surviving spouse when there were other grandchildren and great grandchildren that had

not executed disclaimers. Since different provisions of the federal tax code and the state law concerning descendants were implicated, *Hurt* is not applicable to this situation.

Accordingly, plaintiff's March 18th motion for relief/ reconsideration (#8) is denied. The United States is directed to submit a precedent for judgment granting the relief requested by the counterclaim within 20 days of the file-date of this order.

IT IS SO ORDERED this day of April, 1997.

s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED JULY 14, 1997

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CASE NO. LR-C-96-346

THE DRYE FAMILY 1995 TRUST
DANIEL M. TRAYLOR, Trustee

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

Defendant and Counterclaim Plaintiff,

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR as Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE.

Counterclaim Defendants.

JUDGMENT

In accordance with the order of this Court entered on April 4, 1997, denying the plaintiffs motion for reconsideration and granting the United States' Motion for Summary Judgment, it is HEREBY ORDERED that

1. Judgment is hereby entered in favor of the United States on its counterclaim and against the plaintiffs and the counterclaim defendants.

2. The plaintiffs' complaint is dismissed with prejudice.

3. Judgment is entered against Rohn F. Drye in the amount of $220,980, plus statutory interest, for outstanding Trust Fund Recovery Penalties for the periods ending December 31, 1988, December 31, 1989, and March 31, 1990, and in the amount of $91,952, plus statutory additions to tax, for federal individual income tax liabilities for his 1988 tax year.

4. That the United States is determined to have valid tax liens against all property and rights to property owned by Rohn F. Drye, or transferred by Rohn F. Drye to the Drye Family 1995 Trust; including all real and personal property conveyed in the estate of Irma Deliah Drye, and particularly against the $134,004.33, seized by levy on Stephens, Inc., Investment Bankers, and real property with the following legal description:

> The W1/2 of the SW1/4 of the SE1/4 of the SW1/4, Section 31, Township 3 North, Range 11 West, less and except the North 3 acres thereof.

5. It is further determined that Rohn F. Drye's purported disclaimer and transfer of real and personal property contained in the estate of Irma Deliah Drye, is invalid and of no effect, is fraudulent as against the United States; that the entity known as the Drye Family Trust is a mere nominee or alter ego of Rohn F. Drye; and that the purported disclaimer of interest by Rohn F. Drye is set aside and declared null and void;

6. The federal tax liens of the United States, attached to the property of the estate of Irma Deliah Drye, including the funds seized by levy and the real property described above, and are foreclosed.

7. Further, it is ordered that the real property described shall be sold and the proceeds of such Court-ordered sale, and the funds seized by levy be applied in satisfaction of the United States' aforementioned tax assessments.

Dated: _____ _____
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT STATUTES

26 U.S.C. § 6331(a)

§ 6331. Levy and distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

Ark. Code Ann. § 28-2-101

28-2-101. Right to disclaim interest in property.

(a) A person or a representative of a deceased, incapacitated, or incompetent person to whom any property or interest therein devolves, by whatever means, may disclaim it in whole or in part by delivering a written disclaimer under this chapter.

(b) A disclaimer may be of a fractional share or any limited interest or estate.

(c) The right to disclaim granted by this chapter shall exist irrespective of any limitations imposed upon the interest of the disclaimant in the nature of an expressed or implied spendthrift provision or similar restriction.

(d) This chapter does not abridge the right of any person to waive, release, disclaim, or renounce property or an interest therein under any other statute.

* * *

Ark. Code Ann. § 28-2-102

28-2-102. Waiver and bar.

The right to disclaim property or an interest therein is barred by:

(1) An assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor;

(2) A written waiver of the right to disclaim;

(3) An acceptance of the property or interest or a benefit thereunder;

(4) A sale of the property or interest under judicial sale made before the disclaimer is effected.

* * *

Ark. Code Ann. 28-2-108(a)

28-2-108. Effect of disclaimer generally.

(a)(1) If the property or interest devolved to a disclaimant under a testamentary instrument or under the laws of intestacy and the deceased owner or donee of a power of appointment has not provided for another disposition, it devolves as if the disclaimant had predeceased the decedent or, if the disclaimant was designated to take under a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power.

(2) Any future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had died before the event determining that the taker of the property or interest had become finally ascertained and his interest is indefeasibly vested.

(3) A disclaimer relates back for all purposes to the date of death of the decedent or of the donee of the power or the determinative event as the case may be.

Ark. Code Ann. § 28-9-203

28-9-203. Intestate succession generally.

(a) Any part of the estate of a decedent not effectively disposed of by his will shall pass to his heirs as prescribed in the following sections.

(b) In this connection, the terms "heir" and "heirs," as used in this subchapter, are intended to designate the person or persons who succeed by inheritance to the ownership of real or personal property in respect to which a person dies intestate.

(c) Real estate passes immediately to the heirs upon the death of the intestate, subject to the right of the personal representative under the probate code to mortgage, lease, exchange, sell, or possess it for the payment of claims or legacies, the preservation or protection of the assets of the estate, the distribution of the estate, or any other purpose in the best interest of the estate. However, personalty will pass to the personal representative, if any, for distribution to the heirs unless otherwise disposed of as permitted by the probate code.

* * *

Supreme Court, U.S.
FILED
MAR 10 1999
OFFICE OF THE CLERK

No. 98-1101

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROHN F. DRYE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys
Department of Justice
Washington, D.C 20530-0001
(202) 514-2217

1788

QUESTION PRESENTED

Whether the interest of an heir in an estate constitutes "property" or a "right[] to property" to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bank One Ohio Trust Co. v. *United States*, 80 F.3d 173 (6th Cir. 1996)	6, 7
Clark v. *Gauntt*, 161 S.W.2d 270 (Tex. 1942)	11
Kimura, In re, 969 F.2d 806 (9th Cir. 1992)	7
Leggett v. *United States*, 78 A.F.T.R.2d (RIA) 96-6344 (S.D. Tex. 1996), rev'd, 120 F.3d 592 (5th Cir. 1997)	4, 9, 10, 11, 13
Little v. *United States*, 704 F.2d 1100 (9th Cir. 1983)	7
Mapes v. *United States*, 15 F.3d 138 (9th Cir. 1994)	4, 9, 11, 12
Raihl, In re, 152 B.R. 615 (B.A.P. 9th Cir. 1993)	7
Terwilligers Catering Plus, Inc., In re, 911 F.2d 1168 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991)	7
21 West Lancaster Corp. v. *Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986)	7
United States v. *Bess*, 357 U.S. 51 (1958)	6, 8
United States v. *Comparato*, 850 F. Supp. 153 (E.D.N.Y. 1993), aff'd, 22 F.3d 455 (2d Cir.), cert. denied, 513 U.S. 986 (1994)	8, 13
United States v. *Irvine*, 511 U.S. 224 (1994)	9, 12
United States v. *Mitchell*, 403 U.S. 190 (1971)	9
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985)	4, 6, 8, 11

Cases—Continued: Page

United States v. *Rodgers*, 461 U.S. 677 (1983) 6, 8
United States v. *Stonehill*, 83 F.3d 1156 (9th Cir.), cert. denied, 519 U.S. 992 (1996) 6-7

Statutes:

Internal Revenue Code (26 U.S.C.):
§§ 2001-2704 9
§ 2518 9
§ 6321 ..... 2, 4, 5, 6, 7, 9, 10, 11, 13
§ 6322 6
§ 6502 6
§ 7426 3
Ark. Code Ann. (Michie 1987):
§ 28-2-101 2
§ 28-2-108 2
§ 28-9-203 2

Miscellaneous:

William D. Elliot, *Federal Tax Collection, Liens, and Levies* (2d ed. 1998 Cum. Supp. No. 1) 13
Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-By-The Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839 (1995) 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1101

ROHN F. DRYE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 152 F.3d 892. The orders of the district court (Pet. App. 19a-24a, 25a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to June 1991, the Internal Revenue Service assessed income taxes and various penalties against

petitioner Rohn Drye.[1] Because petitioner failed to pay these assessments, the Service filed notices of tax lien upon "all property and rights to property" belonging to him (26 U.S.C. 6321). Pet. App. 3a, 21a.

In August 1994, petitioner's mother died intestate, leaving an estate with a total value of approximately $233,000 to petitioner as her sole legal heir. At the time of his mother's death, petitioner was insolvent and owed the government approximately $325,000 on the unpaid tax assessments for which notices of outstanding liens had been filed. Pet. App. 3a, 22a.

Petitioner was appointed administrator of his mother's estate on August 17, 1994. In February 1995, petitioner executed and filed in the probate court an instrument entitled "Disclaimer and Consent" in which he disclaimed his entire interest in his mother's estate. Pet. App. 3a, 21a. Pursuant to that disclaimer, the estate passed by operation of state law to petitioner's daughter, Theresa Drye. *Id.* at 21a.[2] Petitioner's daughter concurrently established a trust (The Drye

[1] Unless otherwise noted, all references to "petitioner" are to Rohn Drye.

[2] Under Arkansas law, upon the death of the decedent intestate, real property passes immediately to the decedent's heirs and personal property passes to the personal representative for distribution to the heirs. Ark. Code Ann. § 28-9-203 (Michie 1987); see Pet. App. 32a-33a. An heir may disclaim his interest in the estate. Ark. Code Ann. § 28-2-101 (Michie 1987); see Pet. App. 30a-31a. If such a disclaimer is filed, state law creates a legal fiction that the disclaimant predeceased the decedent, with the result that the disclaimant's share of the estate passes to the next person in line to receive that share. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a. By filing such a disclaimer, an heir may prevent his state-law creditors from obtaining payment from that share of the estate. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a.

Family 1995 Trust), the beneficiaries of which were petitioner, his wife, and his daughter. *Id.* at 3a-4a, 22a. Petitioner resigned as administrator of the estate and his daughter replaced him. *Id.* at 3a, 22a. The state probate court thereupon authorized the distribution of the estate property to petitioner's daughter, who used the property to fund the trust. *Id.* at 3a-4a.

After petitioner revealed his beneficial interest in this family trust during negotiations with the Internal Revenue Service in 1995, the government filed a notice of tax lien against the trust, as Drye's nominee. That lien encumbers the real and personal property of the trust. Pet. App. 4a, 21a. The Service also levied upon accounts held in the trust's name at an investment company. The account proceeds of $134,004.33 were paid to the government pursuant to the levy. *Id.* at 4a, 23a.

2. On May 1, 1996, the trust filed a wrongful levy suit against the United States in federal district court under Section 7426 (26 U.S.C. 7426). The trust contended that, because of the disclaimer of petitioner's interest in the estate, petitioner never held an interest in that estate to which the federal tax liens could attach. Pet. App. 2a, 26a.

The district court granted the government's motion for summary judgment. Pet. App. 19a-24a. The court concluded that petitioner "obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens properly attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens." *Id.* at 23a. In response to the trust's motion for reconsideration, the court emphasized that federal law determines the proper application of federal tax liens and that "a state disclaimer law that is later invoked after the liens

properly attached cannot remove those federal liens." *Id.* at 26a.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court explained that, under the federal tax lien statute, the court is to look to state law to determine "whether a given set of circumstances creates a right or interest" (*id.* at 12a) and then look to federal law to determine whether that right or interest constitutes "property" or "rights to property" (26 U.S.C. 6321) to which the federal tax lien attaches (Pet. App. 12a-13a (citing *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985))). See also *id.* at 6a-8a.[3] The court held that an interest in property under state law constitutes "property" or "rights to property" under federal law (to which the federal tax lien attaches under 26 U.S.C. 6321) if the interest is transferable and has pecuniary value (Pet. App. 7a, 14a).

The court of appeals concluded that petitioner's right to inherit the property of his mother's estate satisfied this standard because that right was transferable and had pecuniary value (Pet. App. 8a, 14a). Petitioner's interest thus represented "property" or "rights to property" for purposes of the federal tax lien statute, and the tax liens filed against petitioner attached to his right to inherit his mother's estate. *Id.* at 13a.

The court explained that petitioner's subsequent disclaimer of his interest under state law could not extinguish the federal liens that previously attached to

[3] The court stated (Pet. App. 12a) that it parted company with the Fifth Circuit's decision in *Leggett* v. *United States*, 120 F.3d 592 (1997), and the Ninth Circuit's decision in *Mapes* v. *United States*, 15 F.3d 138 (1994), because those cases erroneously apply state law, rather than federal law, in ascertaining whether the interest possessed by the taxpayer constitutes "property" or "rights to property" under Section 6321.

that interest. The fact that, for purposes of state law, the disclaimer is treated as if it relates back to the date of the decedent's death does not mean that, at the time the lien attached, petitioner held no "property" or "rights to property" in the estate. Because the federal liens validly attached to that property *before* the disclaimer was made, petitioner's subsequent efforts to dispose of his interest could not defeat the federal lien. Title to the property transferred to the trust remained subject to the preexisting federal tax lien, and the levy on the assets of the trust to satisfy petitioner's debt was therefore not wrongful. Pet. App. 4a-5a, 17a-18a.

ARGUMENT

The court of appeals correctly applied principles that have long been established in the decisions of this Court. Although two earlier court of appeals decisions reach results that cannot be reconciled with the result in this case (see note 3, *supra*), those earlier cases arose in sufficiently distinct contexts that it cannot be said that they squarely conflict with the present decision. If a sufficiently clear conflict hereafter develops, we would acknowledge that review by this Court would be appropriate. At the present time, however, it appears that a uniform resolution of this recurring issue may hereafter be obtained in the courts of appeals. Review by this Court of the question presented in this case is thus unnecessary at this time.

1. The court of appeals correctly applied this Court's longstanding precedent under Section 6321 of the Internal Revenue Code. That Section provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all property and rights to property*, whether real or personal, be-

longing to such person." 26 U.S.C. 6321 (emphasis added).[4] As this Court has frequently emphasized, although "state law controls in determining the nature of the legal interest which the taxpayer had in the property," whether that interest is sufficient to constitute "property" or "rights to property" under Section 6321 is determined solely as a matter of federal law and "state law is inoperative" for this purpose. *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722 (1985) (quoting *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958)). See also *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983); *Bank One Ohio Trust* Co. v. *United States*, 80 F.3d 173, 175-176 (6th Cir. 1996).[5]

There is no statutory definition of the terms "property" and "rights to property" as used in Section 6321. Courts have routinely concluded, however, that an interest in property constitutes "property" or a "right[] to property" under the statute if it has pecuniary value and is transferable. See *United States* v. *Stonehill*, 83 F.3d 1156, 1159-1160 (9th Cir.) (chose-in-action is subject to federal tax lien because it has pecuniary value and is transferable), cert. denied, 519 U.S. 992 (1996); *In re Kimura*, 969 F.2d 806, 810-811 (9th Cir. 1992) (liquor license is subject to federal tax lien because it has pecuniary value and is transferable); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-1172 (6th Cir. 1990) (same), cert. denied, 501 U.S. 1212 (1991); *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986) (same); *Little* v. *United States*, 704 F.2d 1100, 1104-1106 (9th Cir. 1983) (right of redemption, although classified as a "privilege" under state law, is subject to federal tax lien because it has pecuniary value and is transferable).[6]

Applying that established principle to the facts of this case, the court of appeals correctly held (Pet. App. 7a-8a) that the interest that petitioner acquired in his mother's estate at the time of her death constituted "property" or a "right to property" because it had pecuniary value and was transferable. See also note 5, *supra*. At the time of his mother's death, petitioner acquired the right to receive the entire value of the estate (approximately $233,000) less its administrative expenses. *Id.* at 3a. That right plainly had a substantial pecuniary value. Moreover, as the court of appeals noted (*id.* at 8a), that right was transferable under Arkansas law. Because the interest thus obtained by

---

[4] The lien arises as of the date of assessment and continues until the underlying tax liability is satisfied or the statute of limitations on collection bars action. 26 U.S.C. 6322, 6502.

[5] See also Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-By-The-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 858 (1995) (footnote omitted):

> The predominance of substance over state-created labels and formalities is demonstrated by the fact that the federal tax lien attaches to economic rights and interests even if the applicable state law does not classify them as property interests. For example, in *United States* v. *National Bank of Commerce*, the right to withdraw money from a bank account was not called a property right by Arkansas law but nonetheless was held to be a sufficient property interest for federal tax collection purposes.

[6] The taxpayer's interest may not need to be transferable to constitute a "right[] to property" for purposes of Section 6321. In *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d at 175-177, the Sixth Circuit held that a beneficiary's interest in a spendthrift trust, which was not transferable for state-law purposes, was subject to the federal tax lien. See also *In re Raihl*, 152 B.R. 615, 618 (B.A.P. 9th Cir. 1993) ("The inalienability of the pension interests does not destroy their character as property or immunize the interest from the attachment of a federal tax lien.").

petitioner was both valuable and transferable, it constitutes "property" or "rights to property" to which the federal tax lien could—and in fact did—attach.

By subsequently disclaiming his right to his intestate share of the estate, petitioner transferred that right to his daughter, who thereafter transferred the underlying property to the trust. Those transfers, however, do not undermine the effectiveness of the tax lien—any property subject to a federal lien passes "cum onere." *United States* v. *Bess*, 357 U.S. at 57. As the court of appeals correctly held in this case, petitioner's subsequent disclaimer of his interest in the estate did not defeat the previously-attached federal tax lien because, "once a lien has attached to an interest in property, the lien cannot be extinguished * * * simply by a transfer or conveyance of the interest." *United States* v. *Rodgers*, 461 U.S. at 691 n.16.

This conclusion also flows from the established principle that, "[o]nce it has been determined that state law creates sufficient interests in the taxpayer to satisfy the requirements of the statute, state law is inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (quoting *United States* v. *Bess*, 357 U.S. at 57) (internal brackets and quotation marks omitted). In particular, "legal fictions" adopted by state law under which a subsequent disclaimer of a property interest is treated as if it were effective retroactively do not retroactively destroy an existing federal lien. See, *e.g.*, *United States* v. *Comparato*, 850 F. Supp. 153, 159 (E.D.N.Y. 1993) ("state law is relevant only to the determination of whether a taxpayer has a right to certain property, not to whether he can thereafter renounce his right"), aff'd, 22 F.3d 455 (2d Cir.), cert. denied, 513 U.S. 986 (1994). For

example, in *United States* v. *Irvine*, 511 U.S. 224, 240 (1994), this Court held that a disclaimer of a remainder interest in a testamentary trust is a taxable gift by the disclaimant, even though under state law the disclaimer is treated as relating back to the original creation of the trust. The Court explained that "Congress had not meant to incorporate state-law fictions as touchstones of taxability" and that federal taxation looks to the reality of the transaction and is not "struck blind by a disclaimer." *Ibid.* See also *United States* v. *Mitchell*, 403 U.S. 190 (1971) (although a wife's renunciation of a marital interest was deemed retroactive in effect under state law, that state-law fiction is not operative in determining the wife's liability for tax on her share of the community income realized before the renunciation); *United States* v. *Comparato*, 22 F.3d 455, 457 (2d Cir. 1994) ("once the federal liens attached * * * , [the taxpayers'] subsequent renunciations pursuant to state law were not effective against the federal liens").[7]

2. Even though the decision in this case merely applies principles long set forth in this Court's decisions under Section 6321, two prior court of appeals decisions have reached results that are inconsistent with the decision in this case. In *Leggett* v. *United States*, 120 F.3d 592 (5th Cir. 1997), and *Mapes* v. *United States*, 15 F.3d 138 (9th Cir. 1994), the courts held that a renunciation of an inheritance is effective to invalidate a federal tax lien. Although those earlier decisions are inconsistent with the decision in this case, they arise in

---

[7] Certain types of "qualified" disclaimers are given effect for purposes of the federal wealth-transfer taxes (Subtitle B, §§ 2001-2704 of the Internal Revenue Code) under Section 2518 of the Internal Revenue Code. See 26 U.S.C. 2518. Petitioner has not contended that his disclaimer qualifies under this provision.

sufficiently distinct contexts that it cannot be said that they squarely conflict with the present decision.

a. In *Leggett*, the government mistakenly represented to the court of appeals that the case involved solely a question of *state* law. The government failed to point out that the question whether a particular interest constitutes "property" or "rights to property" within the meaning of Section 6321 is a question of federal law. The Fifth Circuit was thereby led erroneously to give retroactive effect to the taxpayer's state-law renunciation of his property interest.

In *Leggett*, as in the present case, the United States acquired a tax lien in all property and rights to property of the taxpayer before she obtained an interest in her aunt's estate. And, as in the present case, the taxpayer disclaimed her interest in the estate and claimed, as a result, that the tax lien became invalid. The district court held in favor of the government. *Leggett* v. *United States*, 78 A.F.T.R.2d (RIA) 96-6344 (S.D. Tex. 1996), rev'd, 120 F.3d 592 (5th Cir. 1997). The court stated (i) that "whether a taxpayer has an interest in property to which a tax lien may attach" is controlled by "[s]tate law" and (ii) that the taxpayer had such an interest in that case because, under Texas law, title to property vests in the beneficiaries immediately upon a decedent's death. *Id.* at 96-6346. The court concluded that the federal lien, once attached, could not be divested by a subsequent state-law disclaimer. *Id.* at 96-6347.

In reversing that decision, the Fifth Circuit followed the erroneous submission of the government in stating that the question whether the taxpayer had a property interest to which the federal tax lien could attach is solely a question of state law. 120 F.3d at 594. See also *id.* at 597 ("Section 6321 adopts the state's definition of

property interest."). The court concluded that the right to renounce an interest in an estate did not constitute "property" under Texas law. Because a "property" interest did not exist under state law, the court held that the taxpayer "never had a property right" to which the federal tax lien could attach under Section 6321. 120 F.3d at 596.

In *Leggett*, the government failed to advise the Fifth Circuit that the controlling decisions of this Court clearly establish that whether an interest created under state law constitutes "property" or "rights to property" for purposes of Section 6321 is a question of *federal* law. *United States* v. *National Bank of Commerce*, 472 U.S. at 727. Since the taxpayer's right to receive the assets of the estate was plainly a valuable right and was transferable (*Clark* v. *Gauntt*, 161 S.W.2d 270, 272 (Tex. 1942)), it constituted a "right[] to property" to which the tax lien would attach under federal law. Because the court in *Leggett* was misinformed by the government as to the applicable law, and because that court has not had an opportunity to revisit this issue, it cannot be said that the decision in *Leggett* represents a fully mature conflict with the present case.

b. In *Mapes*, the taxpayer's mother died, leaving him one-half of her estate. At the time of his mother's death, the taxpayer and his wife owed the United States approximately $500,000 in outstanding taxes. One week after his mother's death, in an effort to prevent the government's lien from attaching to his interest in his mother's estate, the taxpayer renounced his interest in favor of his children. 15 F.3d at 139.

The government argued in *Mapes* that (i) upon his mother's death, the taxpayer acquired a vested interest in his mother's estate under the applicable local law, (ii) an existing federal tax lien attached at that time to that

vested interest and (iii) the taxpayer's subsequent renunciation of his interest did not defeat the existing federal lien. 15 F.3d at 139-140, 141-142 n.4. The Ninth Circuit rejected the government's contention. While acknowledging that "federal law is controlling on the question of whether Mapes had a lienable interest in his mother's estate," the court concluded that "the fundamental question [is] whether Mapes had any interest in the property, lienable or not." *Id.* at 140. The court held that "[f]or the answer to that question we must look to state law, not federal law." *Ibid.* Noting that the taxpayer's renunciation (one week after his mother's death) was timely and valid under state law, the court held that, because the renunciation related back to the date of death under state law, the taxpayer never had any interest in the property to which the federal tax lien could attach. *Ibid.* The court concluded that the federal tax lien was therefore ineffective against the taxpayer's interest in his mother's estate. *Id.* at 140-141.

The conclusion of the court of appeals in *Mapes*—essentially that a renunciation under state law can relate back to extinguish retroactively a taxpayer's property interest to which a federal tax lien would otherwise have remained attached (thus defeating the lien)—cannot be reconciled with the reasoning of this Court in *United States* v. *Irvine*, *supra*. In *Irvine*, which was decided three months *after* the Ninth Circuit entered its decision in *Mapes*, the Court emphasized that, in determining whether a taxpayer possesses an interest in "property" for estate and gift tax purposes, federal courts are to look to factual realities and not be "struck blind" by state-law "legal fiction[s]" that permit renunciations of ownership to be retroactively effective. 511 U.S. at 240. That holding in *Irvine* provides direct

support for the decision of the court of appeals in this case and for the similar decision of the Second Circuit in *United States* v. *Comparato*, 22 F.3d at 457:

> The Supreme Court decision in *United States v. Irvine* supports the result reached in *Comparato*. In *Irvine* * * * [t]he Supreme Court reaffirmed the principle followed in *Comparato* that "although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." The Court then applied federal law in determining the validity of Irvine's disclaimer for federal gift tax purposes.

William D. Elliot, *Federal Tax Collections, Liens, and Levies* ¶ 9.09[3][d][ii], at S9-10 (2d ed. 1998 Cum. Supp. No. 1) (footnotes omitted).

In any future case presenting the same issue, the Ninth Circuit would be required to consider the effect of this Court's decision in *Irvine* upon the reasoning and holding of *Mapes*.[8] Until the Ninth Circuit has had an opportunity to reconsider this issue, and to give effect to this Court's decision in *Irvine*, there is no direct and mature conflict among the circuits that requires resolution by this Court.

---

[8] To be sure, the Fifth Circuit in *Leggett* purported to distinguish *Irvine* on the grounds that *Irvine* involved the gift tax provisions, which do not adopt state law, whereas the statute at issue in *Leggett* (and here), Section 6321, "adopts the state's definition of property interest." *Leggett*, 120 F.3d at 597. But since, as we have shown, Section 6321 does *not* adopt the state's definition of "property" or "rights to property," the Fifth Circuit's attempt to distinguish *Irvine* is unavailing. See pp. 10-11, *supra*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys

MARCH 1999

Supreme Court, U.S.
FILED
JUN 4 1999
CLERK

(3)

No. 98-1101

In the
Supreme Court Of The United States

October Term, 1998

ROHN F. DRYE, JR., SUE C. DRYE,
THERESA K. DRYE AND
THE DRYE FAMILY 1995 TRUST,
DANIEL M. TRAYLOR, TRUSTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Writ of Certiorari
To the United States Court of Appeals
For The Eighth Circuit

JOINT APPENDIX

Daniel M. Traylor
Counsel of Record
Law Office of
Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330

Attorney for the Petitioners

Seth P. Waxman
Solicitor General
Counsel of Record
Loretta C. Argrett
Assistant Attorney General
David I. Pincus
Anthony T. Sheehan
Attorneys
Department of Justice
Washington D.C.
20530-0001
(202) 514-2227

Attorneys for Resopndent

Petition for Certiorari Filed November 16, 1998
Certiorari Granted April 19, 1999

7188

CornerStone Graphics, Inc.

TABLE OF CONTENTS

Relevant Docket Entries In The Courts Below 1

The following opinions, decisions, judgments and orders have been omitted in printing the joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion Of The United States Court Of Appeals For the Eighth Circuit Filed August 17, 1998 ..... App. 1a - 18a

Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Granting Motion For Summary Judgment Dated And Filed February 25, 1997 ..... App. 19a - 24a

Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Denying Petitioner's Motion For Reconsideration Dated And Filed April 4, 1997 ..... App. 25a - 27a

Judgment Of The United States District Court For The Eastern District Of Arkansas, Western Division Dated July 14, 1997 ..... App. 28a - 29a

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

I. Relevant Docket Entries in Drye v. United States, No. LR-C-96-346 (E.D.Ark)

05/01/1996 COMPLAINT; (No summons(es) issued; Filing fee of $120.00 pd, receipt #65769) [Date Entered: 05/02/96, By: kp]

05/07/1996 RETURN OF SERVICE executed upon defendant USA on 5/6/96 [Date Entered: 05/07/96, By: jad]

06/28/1996 ANSWER by defendant USA [Date Entered: 06/28/96, By: jad]

06/28/1996 COUNTERCLAIM by defendant USA against plaintiffs Drye Family Trust and Daniel M Traylor; adding counterdefendants Rohn F Drye, Sue C Drye and Theresa K Drye [Date Entered: 06/28/96, By: jad]

06/28/1996 SUMMONS issued as to counter-defendants Rohn F Drye, Sue C Drye and Theresa K Drye [Date Entered: 06/28/96, By: jad]

07/17/1996 ANSWER by counter-defendants to Counterclaim [Date Entered: 07/18/96, By: jad]

08/13/1996 SCHEDULING ORDER: (DOC) trial set for 9:30 4/14/97; discovery due 2/17/97; status report due 3/3/97; pretrial info due 3/3/97 (cc: all counsel) [Date Entered: 08/13/96, By: lb]

01/29/1997 RESPONSE by defendant USA to plaintiffs motion for summary judgment [Date Entered: 01/29/97, By: jad]

01/29/1997 CROSS MOTION by defendant USA for summary judgment [Date Entered: 01/29/97, By: jad]

02/25/1997 ORDER by Judge George Howard Jr. granting defendant's motion for summary judgment [6-1]; directing defendant USA to submit a precedent for judgment granting relief requested by the counterclaim within 20 days of this order(cc: all counsel) [Date Entered: 02/26/97, By: jad]

03/18/1997 MOTION by plaintiffs for reconsideration of order entered 02/25/97 [Date Entered: 03/19/97, By: jad]

04/04/1997 ORDER by Judge George Howard Jr. denying motion for reconsideration of order entered 02/25/97 [8-1]; the United States is directed to submit a precedent for judgment granting the relief requested in the counterclaim within 20days of the file date of this order (cc: all counsel) [Date Entered: 04/07/97, By: jad]

07/14/1997 JUDGMENT: by Judge George Howard Jr. pursuant to order of 04/04/97 granting defendant/counter-claimant USA's motion for summary judgment, judgment is entered in favor of the USA and against plaintiffs & counter-defendants in the sumof $220,980.00 + statutory interest + $91,952.00 + $134,004.33 seized by levy on Stephens, Inc. and is hereby foreclosed; terminating case (cc: all counsel) (EOD 07/14/97) [Date Entered: 07/14/97, By: jad]

08/12/1997 NOTICE of appeal by Drye Family Trust, Daniel M Traylor, Rohn F Drye, Sue C Drye, Theresa K Drye from District Court decision [12-2] (appeal fees paid) (2 certified copies to Clerk 8USCA), (cc: counsel) [Date Entered: 08/13/97, By: dc]

08/21/1997 DOCKETING LETTER: 8 USCA Number 97-3249; counsel to proceed on appendix [Date Entered: 08/21/97, By: dc]

10/13/1998 Opinion (8USCA) we affirm the judgment of the district court granting summary judgment in favor of the government and denying appellants' motion for summary judgment. [Date Entered: 10/13/98, By: dc]

10/13/1998 MANDATE from 8 USCA affirming the decision of the District Court [13-1] (original file remain in possession of Clerk USCA8) [Date Entered: 10/13/98, By: dc]

01/22/1999 NOTICE of filing petition for writ of certiorari with Supreme Court #98-1101 [Date Entered: 01/25/99, By: dc]

II. Relevant Docket Entries in *Drye v. United States*, No. 97-3249 (8th Cir.)

3/5/98 *SET FOR ARGUMENT* - April in St. Louis. [97-3249] (mel)

4/15/98 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Theodore McMillian, Circuit Judge, Pasco M. Bowman, Circuit Judge, Diana E. Murphy,Circuit Judge . Daniel M. Traylor for Appellants Theresa K. Drye, *et al*. Anthony T. Sheehan for Appellee USA Rebuttal by: Mr. Traylor. RECORDED. [97-3249] (lmt)

7/28/98	RECORDS received: Original File, consisting of 1 Volume(s), Location STL.[97-3249] (stl)
8/17/98	THE COURT: Pasco M. Bowman, Theodore McMillian, Diana E. Murphy. OPINION FILED by Theodore McMillian PUBLISHED . [97-3249] [1031633] (ema)
8/17/98	JUDGMENT: Pasco M. Bowman, Theodore McMillian, Diana E. Murphy: The judgment of the lower court is AFFIRMED in accordance with the opinion. [97-3249] [1031637] (ema)
10/8/98	MANDA[illegible]SSUED [97-3249] (lcd)
10/16/98	RECEIPT for Mandate. [97-3249] [1069624] (dms)
11/4/98	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 vol. OF;. [97-3249] (jjf)
1/20/99	U.S. Supreme Court notice regarding petition for wnt of certiorari . Filed in the Supreme Court on 11/16/98 . Supreme Ct. Case No.: 98-1101 [97-3249] [108S481] (kas)

4/23/99	Notification from Supreme Court dated 4/19/99 stating that they had entered an order granting the petition for writ of certiorari limited to the following question: "Whether the interest of an heir in an estate constitutes 'property' or a 'right to property' to which the federal tax lien attached under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law." [1085481-1] [97-3249] [1125898] in Sup. Ct. No. 98-1101. [97-3249] (mjh)

Supreme Court, U.S.
FILED
JUN 4 1999
CLERK

(4)

No. 98-1101

In the
Supreme Court Of The United States

October Term, 1998

ROHN F. DRYE, JR., SUE C. DRYE, THERESA K. DRYE AND THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, TRUSTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE PETITIONERS

Daniel M. Traylor
Counsel of Record
Law Office of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330

Attorney for the Petitioners

CornerStone Graphic, Inc., Little Rock, AR

2589

QUESTION PRESENTED

Whether the interest of an heir in an estate constitutes "property" or a "right to property" to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law.

or

When, if at all, does the federal tax lien under 26 U.S.C. 6321 attach to a lineal descendant's rights in an intestate's estate.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

LEGAL PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE FEDERAL COURTS BELOW ERRED IN HOLDING THAT THE FEDERAL TAX LIEN OF I.R.C. §6321 ATTACHED TO THE TAXPAYER'S INTEREST IN THE INTESTATE'S ESTATE BECAUSE THAT INTEREST DOES NOT CONSTITUTE "PROPERTY" OR "RIGHT TO PROPERTY" AS REQUIRED UNDER FEDERAL LAW.

A. The taxpayer's interest in the intestate's estate under state law consisted of a personal right of decision to accept or reject the gift of inheritance, and as such does not constitute "property" or "rights to property" under state law.

B. The taxpayer's interest in the intestate's estate under federal law cannot be "property" or "rights to property" because such interest was without pecuniary value and was non-transferable.

CONCLUSION 16

APPENDIX A-1, A-2

TABLE OF AUTHORITIES

Cases **Page(s)**

Aquilino v. United States, 363 U.S. 509, 513 (1960) 8

Brown v. Routzahn, 63 F. 2d. 914 (6th Cir.), *cert. denied,* 290 U.S. 641 (1933) 10

Elliott v. Hardcastle, 271 Ark. 90, 93 (1980) 11

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177 (1940) 12

Hardenberg v. Com'r, 198 F. 2d. 63 (8th Cir.) *cert. denied,* 344 U.S. 863 (1952) 9

Hurt v. United States, 566 F. Supp. 356 (E.D. Ark., 1983) 13

Hoecker v. United Bank of Boulder, 476 F.2d 838 (C.A. 10, 1973) aff'g 334 F.Supp. 1080 (D.Colo. 1971) 13

Leggett v. United States, 120 F. 3d. 592 (5th Cir., 1997) 15

Mapes v. United States, 15 F. 3d. 138 (9th Cir., 1994) 15

United States v. Bess, 357 U.S. 51, 55 (1958) 8

United States v. Comparato, 22 F. 3d. 455 (2nd Cir., 1994) 15

United States v. Irvine, 511 U.S. 224 (1994) 14

Cases **Page(s)**

United States v. McCrackin, 189 F. Supp. 632 (S.D. Ohio 1960) 13

United States v. Security Trust & Sav. Bank, 340 U.S. 47, 51, 71 (1950) 8

United States v. National Bank of Commerce, 472 U.S. 713, 722-23 (1985) 5,8

Statutes

26 U.S.C. §6321 3,6,8,13

26 U.S.C. §7426 4

Ark. Stat. Ann. §§62-3201-3210 (Bobbs-Merrill Cum. Supp. 1973, repealed 1981) 10,11

Ark. Stat. Ann. §62-3208 (Bobbs-Merrill Cum. Supp. 1973, repealed 1981) 11

Ark. Code Ann. §§28-2-101 - 109 11

Ark. Code Ann. §28-2-101 11,12

Ark. Code Ann. §28-2-102 11,13,15

Ark. Code Ann. §28-2-107 11

Ark. Code Ann. §28-2-108 12

Ark. Code Ann. §28-9-203(c) 14

Cases **Page(s)**

Ark. Code Ann. §28-1-104(a)(5) 14

Ark. Code Ann. §28-2-102 11,13

Other Authorities

Commentaries on Ark. Code Ann. of 1987, (1995 Replacement Vol. B at 502) 12

Jake Looney, Use of the Disclaimer as an Estate Planning Device under Arkansas Law, Ark. L. Notes 67 (1985) 9

Legislative Survey, Decedents' Estates, 4 UALR L.J. 591 (1984) 11

Unif. Disclaimer of Transfer by Will, Intestacy or Appointment Act, 8A U.L.A. 166, 166-68 (1993) 9,12

Williams on Law of Real Property, 75 (2d Am. Ed 1857) 9

No. 98-1101

In the
Supreme Court Of The United States

October Term, 1998

ROHN F. DRYE, JR., SUE C. DRYE, THERESA K. DRYE AND THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, TRUSTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.1a - 18a) is reported at 152 F.3d 892. The orders and judgment of the U.S. District Court, Eastern District of Arkansas, Western Division, are unreported, but are reproduced at Pet. App. 19a - 29a.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. A petition for certiorari was filed on November 16, 1998 and granted on April 19, 1999. The Court's jurisdiction is based on 28 U.S.C. §1254(1)(1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

Internal Revenue Code (26 U.S.C.):
§6321
§7426(a)(1)

Arkansas Code Ann. (Michie 1987):

Ark. Code Ann. §28-1-102(a)(10)
Ark. Code Ann. §28-1-104(a)(1)(5)(7)

These provisions are set forth at the Appendix hereto.

Internal Revenue Code (26 U.S.C.):
§6331(a)

Arkansas Code Ann. (Michie 1987):

Ark. Code Ann. §28-2-101
Ark. Code Ann. §28-2-102
Ark. Code Ann. §28-2-108
Ark. Code Ann. §28-9-203

These provisions are set forth at Pet. App. 30a - 33a.

STATEMENT

In November 1989, an engineering firm owned by Petitioner Rohn F. Drye, Jr., then age 66, failed through an involuntary liquidation, leaving Mr. Drye insolvent. One of his many creditors was the Internal Revenue Service. In 1990 and 1991, the Service assessed income and other taxes and various penalties against Mr. Drye. Because Mr. Drye was unable to pay these assessments, the Service filed notices of tax lien upon "all

property and rights to property" belonging to him (26 U.S.C. §6321) App 1 .

On August 3, 1994, Mr. Drye's mother, widow Irma Delilah Drye, age 89, died intestate at her home in Pulaski County, Arkansas. Her estate was valued at approximately $233,000, of which $158,000 was personalty and $75,000 was the homestead. She was survived by two lineal descendants, her son Rohn and his daughter, Petitioner Theresa K. Drye, then age __. At the time of his mother's death, Mr. Drye was insolvent and owed the Service approximately $325,000 on the unpaid tax assessments for which notices of tax lien had been filed.

Mr. Drye was appointed administrator of his mother's estate by the Pulaski County, Arkansas Probate Court on August 17, 1994. On February 6, 1995, Mr. Drye filed in instrument entitled "Disclaimer and Consent" with the probate court in which he rejected the gift of inheritance of his mother's estate. On February 7, 1995, the probate court accepted Mr. Drye's resignation as administrator and appointed Theresa as successor administratrix. On March 10, 1995, the probate court entered an order authorizing the final distribution of estate assets to Theresa as the sole heir of her grandmother's estate under state law.

Later, Theresa funded the Petitioner, Drye Family 1995 Trust, with the assets she received as her property under the probate court order of final distribution. The beneficiaries of the trust are Theresa, and during their lifetime, Mr. Drye and his wife, Petitioner Sue C. Drye. Distributions are discretionary with the trustee and may be made only for the health, maintenance and support of the beneficiaries. The trust is spendthrift.

In April, 1995, Mr. Drye approached the Service in an effort to compromise and settle his tax liabilities. During negotiations, he disclosed his beneficial interest in the trust. On

April 11, 1996, the Service levied upon an account held in the trust's name at an investment company and seized $134,004.33. On the same day, the Service filed a notice of tax lien against the trust, as Mr. Drye's nominee, encumbering the trust's real property (i.e. the former family homestead) and all its personal property.

On May 1, 1996, the trust filed a wrongful levy action against the United States in the U.S. District Court, Eastern District of Arkansas under 26 U.S.C. §7426 (a) (1). App. 1 . The trust contended that Mr. Drye never had any recognized or enforceable right, at law or in equity, in the trust property encumbered, levied and seized by the Service.

The Government answered with a general denial and counterclaimed to foreclose the trust's equity of redemption in the former homestead and to reduce to judgment the assessments against Mr. Drye.

Th[illegible] and the Government both moved for summary judgment. The district court granted the Government's motion. Pet. App. 19a. The court concluded that Mr. Drye "obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens." *Id.* at 23a.

In response to the trust's motion for reconsideration, the court conceded "that Arkansas law is used to determine the legal interest Rohn had in the property against which the tax lien is attached, but federal law governs when the tax liens attached." *Id.* at 26a. The court then stated "a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens." *Id.* at 26a.

The court of appeals affirmed. Pet. App. 1a - 18a. The court explained that, under the federal tax lien statute, the court is to look to state law to determine "whether a given set of circumstances creates a right or interest" (*id.* at 12a) and then look to federal law to determine whether that right or interest constitutes "property" or "rights to property" under 26 U.S.C. §6321 to which the federal tax lien attaches. Pet. App. 12a - 13a (citing *United States v. National Bank of Commerce*, 472 U.S. 713, 727 (1985)). See also *id.* at 6a - 8a. The court held that an interest in property under state law constitutes "property" or "rights to property" under federal law (to which the federal tax lien attaches under 26 U.S.C. §6321) if the interest is transferable and has pecuniary value (Pet. App. 7a, 14a).

The court of appeals concluded that Mr. Drye's right to inherit the property of his mother's estate satisfied this standard because that right was transferable and had pecuniary value (Pet. App. 8a, 14a). Mr. Drye's interest thus represented "property" or "rights to property" for purposes of the federal tax lien statute, and the tax liens filed against Mr. Drye attached to his right to inherit his mother's estate. *Id.* at 13a.

The court explained that Mr. Drye's subsequent disclaimer of his interest under state law could not, by legal fiction, extinguish the federal liens that previously attached to that interest. The fact that the disclaimer is treated as if it relates back to the date of the decedent's death does not mean that, at the time the lien attached, Mr. Drye held no "property" or "rights to property" in the estate. Because the federal liens validly attached to that property before the disclaimer was made, Mr. Drye's subsequent renouncement could not defeat the federal lien. Title to the property transferred to the trust remained subject to the preexisting federal tax lien, and the levy on the assets of the trust to satisfy Mr. Drye's debt was therefore not wrongful. Pet. App. 4a - 5a, 17a - 18a.

SUMMARY OF ARGUMENT

I.A. In or about 1991, the IRS made assessments against taxpayer Rohn F. Drye, Jr. and, under I.R.C. §6321 federal liens attached to all of his property and rights to property. In 1994, Mr. Drye's mother died intestate in Pulaski County, Arkansas leaving two lineal descendants, Mr. Drye and his daughter, Theresa K. Drye. In 1995, the probate court with jurisdiction to determine heirship adjudged that Theresa was the sole heir of her grandmother's estate because Mr. Drye had legally exercised his personal right of decision to reject the inheritance under state law. As a consequence, the probate court ordered the distribution of the estate's assets to Theresa. Theresa, in turn funded a family trust with the assets distributed under the authority of the probate court. When Mr. Drye explained these events to the IRS, the Service seized $134,000 of the trust's funds and moved to foreclose an alleged tax lien against the trust's real estate.

The trust then brought an action against the Government to recover the funds seized and to enjoin the Government's foreclosure procedure. The federal courts below upheld the Government's seizure on the theory that the federal lien of I.R.C. §6321 attached at the instant of her death to Mr. Drye right to succeed to his mother's estate and that his subsequent disclaimer under state law could not extinguish the federal lien once attached.

The federal courts below erred in their analysis because under federal law, Mr. Drye never acquired property or rights to property in his mother's estate as required under I.R.C. § 6321.

Under state law, at the instant of her death, Mr. Drye acquired a mere right of personal decision to accept or reject the gift of inheritance of his mother's estate. Mr. Drye lawfully elected to reject the gift. This personal right of decision to accept

or reject the gift of inheritance under state law was not property or rights to property under federal law, because the right was personal to Mr. Drye, could not be the subject of a transfer or assignment, and could not be bargained away or exchanged for anything of pecuniary value. Because Mr. Drye disclaimed, his birthright to otherwise succeed to his mother's estate remained unvested, inchoate, unrecognized, and unenforceable, at law or in equity, under state law. Consequently, there was no property or rights to property to which the federal lien could attach.

ARGUMENT

I. THE FEDERAL COURTS BELOW ERRED IN HOLDING THAT THE FEDERAL TAX LIEN OF I.R.C. §6321 ATTACHED TO THE TAXPAYER'S INTEREST IN THE INTESTATE'S ESTATE BECAUSE THAT INTEREST DOES NOT CONSTITUTE "PROPERTY" OR "RIGHT TO PROPERTY" AS REQUIRED UNDER FEDERAL LAW.

A. The taxpayer's interest in the intestate's estate under state law consisted of a personal right of decision to accept or reject the gift of inheritance, and as such does not constitute "property" or "rights to property" under state law.

The issue is whether the federal courts below correctly interpreted federal and state law in holding that a federal tax lien attached to Mr. Drye's "rights" in his mother's estate upon her last breath so as to justify the seizure and encumbrance of the estate's assets. The answer is no.

When a person fails to pay his taxes, after assessment, all property rights that he has or acquires thereafter immediately and automatically are subject to a federal tax lien, see 26 U.S.C. §6321 and *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 51, 71 (1950). Section 6321 does not, however, create or define what constitutes a property interest. Instead, state law determines whether a taxpayer has a property interest to which a federal lien may attach. See *United States v. National Bank of Commerce*, 472 U.S. 713, 722-23, *Aquilino v. United States,* 363 U.S. 509, 513 (1960); *United States v. Bess,* 357 U.S. 51, 55 (1958). Therefore, the Court must decide whether under

applicable state law, Mr. Drye ever had a property interest in his mother's estate.

At common law in both England and the United States, it was settled that a taker of property under a will had the absolute right to accept or reject a legacy or devise. See *Unif. Disclaimer of Transfer by Will, Intestacy or Appointment Act*, 8A U.L.A. 166, 166-68 (1993). It was said that no one can make another an owner of an estate against his consent. The legacy or devise was deemed a gift, and thus a bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance. Under the rule, the disclaimed interest related back to the date of the testator's death so that the interest did not vest in the grantee, but remained in the original owner as if the will had never been executed. Devolution of the interest was generally treated the same as in case of lapse.

However, an "heir" had no common law power to prevent passage of title to himself by disclaimer. "An heir at law is the only person whom the law of England vests property, whether he will or not. No disclaimer that he may make will have any effect, though, of course, he may as soon as he pleases dispose of the property by ordinary conveyance." Williams on Law of Real Property, 75 (2d. Am. Ed. 1857).

The difference between testate and intestate successions in respect to the right to disclaim produced a number of illogical and undesirable consequences. See *Jake Looney, Use of the Disclaimer as an Estate Planning Device under Arkansas Law*, Ark. L. Notes 67 (1985). For example, an heir who sought to reject his inheritance was subjected to the Federal gift tax on the theory that since he could not prevent the passage of title to himself, any act done to rid himself of the interest necessarily involved a transfer subject to gift tax liability. *Hardenberg v. Com'r*, 198 F. 2d. 63 (8th Cir.), *cert. denied*, 344 U.S. 863 (1952).

Conversely, a legatee or devisee who rejected a legacy or devise under a will incurred no such tax consequences. *Brown v. Routzahn*, 63 F. 2d. 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933). Moreover, the difference between testate and intestate successions, rooted in the feudal theory that a contrary rule would allow an heir to break or bar an estate in tail, became something of an anachronism.

Arkansas law concerning the vesting of estates and the right of renunciation was clarified with the State's adoption of General Act 457 of 1973 as codified at Ark. Stat. Ann. §§62-3201-3210 (Bobbs-Merrill Cum. Supp. 1973, repealed 1981). Section 16 of Act 457 is on point:

> SECTION 16. Emergency clause. It is hereby found and determined by the General Assembly of the State of Arkansas that a disclaimer has not been heretofore defined by this legislative body, that confusion and uncertainty surround the manner in which beneficiaries and heirs should decline testamentary gifts and intestate inheritances, as well as the subsequent disposition to be made of any gift or inheritance so declined, and that the immediate passage of this Act is necessary to provide legislative guidance in this area. Ark. Code Ann. §62-3210 (Bobbs-Merrill Cum. Supp. 1973).

Significantly, Mr. Drye's disclaimer would have been void under Act 457 because of Section 8 thereof which provided:

> SECTION 8. Insolvency. The right to disclaim otherwise conferred by the provisions of this Act shall be barred if the beneficiary is insolvent at the time of the event giving rise to the right to disclaim. Ark. Stat. Ann. §62-3208 (Bobbs-Merrill Cum. Supp. 1973, repealed 1981).

See *Elliott v. Hardcastle*, 271 Ark. 90 (1980); *Legislative Survey, Decedent's Estates*, 4 UALR L.J. 591.

The relevant law is now General Act 348 of 1981 and codified in the Arkansas Probate Code as Ark. Code Ann. §§28-2-101 - 109. Act 348 expressly repeals Act 457 of 1973 and Section 8 thereunder. Such Act now provides in pertinent part:

> Section 1. Rights to disclaim interest in property. A person to whom any property or interest therein devolves, by whatever means, may disclaim it...by delivering a written disclaimer under this chapter. Ark. Code Ann. §28-2-101 (Michie 1987).

> Section 2. Waiver and bar. The right to disclaim property or an interest therein is barred by: (1) An assignment, conveyance, encumbrance, or a contract therefor; (2) A written waiver of the right to disclaim; (3) An acceptance of the property or interest or a benefit thereunder; (4) A sale of the property or interest under judicial sale made before the disclaimer is affected. Ark. Code Ann. §28-2-102 (Michie 1987).

> Section 7. Time of disclaimer - Delivery. (a)(1)... If the property or interest has devolved to the disclaimant by the laws of intestacy, the disclaimer shall be delivered...not later than nine (9) months after the death of the deceased owner. Ark. Code Ann. §28-2-107.

Mr. Drye's Disclaimer and Consent is in good statutory form because it satisfies each and every requirement of Act 348. The legal effect of Mr. Drye's Disclaimer and Consent is provided by:

> Section 8. Effect of disclaimer. (a)(1) If the property or interest devolved to a disclaimant under the law of intestacy...it devolves as if the disclaimant had predeceased the decedent. (3) A disclaimer relates back for all purposes to the date of death of the decedent. (emphasis added) Ark. Code Ann. §28-2-108 (Michie 1987).

Neither the Arkansas Supreme Court nor the Arkansas Court of Appeals has had occasion to interpret Act 348. Nevertheless, the Court must do its duty as pronounced in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940):

> ... The highest state court is the final authority on state law ... but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State.

Petitioner notes that Act 348 mirrors the Uniform Disclaimer of Property Interest Act of 1978 promulgated by the Section on Real Property, Probate and Trust Law of the American Bar Association. The official commentaries of the uniform act have been made part of the Arkansas Code of 1987 as published at page 502 of the Commentaries volume which provides:

> "As regards creditors, taxing authorities and others, the provision for "relation back" has the legal effect of preventing a succession from becoming operative in favor of the disclaimant.

> The relation back is "for all purposes: which would include, among others, for the purpose of rights of creditors and taxing authorities." Similarly, numerous cases have held that a devisee or legatee can disclaim a devise or legacy despite the claims of creditors; *Hoecker v. United Bank of Boulder*, 476 F.2d 838 (C.A. 10, 1973) aff'g 334 F.Supp. 1080 (D.Colo. 1971) (bankruptcy); *United States v. McCrackin*, 189 F. Supp. 632 (S.D. Ohio 1960) (Federal income tax liens).

The only reported case to construe Act 348 issued from the district court below. See *Hurt v. United States*, 566 F. Supp. 356 (E.D. Ark., 1983). There the district court found that the relation back doctrine had the legal effect of passing the estate in question directly (emphasis added) to the non-disclaiming lineal descendants of the intestate decedent. This case supports inferentially that Mr. Drye acquired no property interest in the decedent's estate. *Id.* at 358.

At the moment of his mother's death, Mr. Drye acquired nothing more than a personal right of decision as to whether to accept or reject the gift of inheritance offered. This personal right of decision did not constitute property or rights to property under 26 U.S.C. §6321 because the right had no pecuniary value and was not transferable. By definition, a descendent cannot receive any consideration for execution and delivery of a disclaimer, and the right to disclaim is personal to the descendent and cannot be assigned or otherwise transferred to others without invoking the bar of Ark. Code Ann. §28-2-102.

B. The taxpayer's interest in the intestate's estate under federal law cannot be "property" or "rights to property" because such interest was without pecuniary value and was non-transferable.

The federal courts below went astray from the proper application of federal when they assumed that the legal fiction lurking in this case is the relation back of Mr. Drye's disclaimer. Pet. App. 8a, 13a, 14a, 17a. In *United States v. Irvine*, 511 U.S. 224 (1994) the court recognized that the right to disclaim might, under state law, be based on a gift acceptance-rejection theory and be, therefore not a legal fiction, but reality. *Id.* at 239-40. The court of appeals incorrectly found that reality is located at Ark. Code Ann. §28-9-203(c). This statute provides that real estate passes immediately to the heirs upon the death of an intestate, subject to probate administration, and that personalty passes to the administrator for distribution to the heirs unless otherwise disposed of as permitted by the Arkansas Probate Code. The federal courts below got it backwards. The legal fiction is Section 28-9-203(c). Upon the death of an intestate, the property passes to his or her estate for administration.

Petitioners assert that under the Arkansas Probate Code, Mr. Drye never was an "heir" of his mother's estate. This assertion is based upon the jurisdiction of the probate courts to determine in the first instance the heirs of an intestate decedent. Ark. Code Ann. §28-1-104(a)(5) ("the probate court shall have jurisdiction over...the determination of heirship"). Here the probate court adjudged that only Theresa K. Drye met the legal definition of an heir under the Arkansas Probate Code; Mr. Drye's status never exceeded that as a lineal descendant of the intestate decedent. This finding is consistent with the gift acceptance-rejection theory of the succession of estates under state law.

Another error by the federal courts below is their finding that under state law, the right to inherit has pecuniary value and is transferable. Pet. App. 9a. In the first instance, Petitioners assert that all of the cited cases appear to be determined under prior law, but more importantly, all of the cases beg and bootstrap the fundamental issue involved here, i.e., when, if at all, does a lineal descendant acquire a valuable right in an intestate's estate under the Arkansas gift acceptance-rejection theory of succession of estates. The answer is found in statutory analysis. The succession vests, if at all, at the moment the descendant acts so as to bar the exercise of his personal right of decision to disclaim under Ark. Code Ann. §28-2-102, or the expiration of nine months from the date of the intestate's death, whichever is earlier. In all the cases cited by the court of appeals, the parties involved were already vested with the property, estate or other interest involved and thus were precluded from the exercise of the personal right of decision to disclaim.

The circuit panel below was misguided in parting company with the Fifth and Ninth Circuits of Appeal in near identical factual and legal cases and instead purported to side with the Second Circuit. See *Leggett v. United States*, 120 F. 3d. 592 (5th Cir., 1997), *Mapes v. United States*, 15 F. 3d. 138 (9th Cir., 1994) and *United States v. Comparato*, 22 F. 3d. 455 (2nd Cir., 1994), respectively. First, there is no real conflict between the decisions in these three cases. Petitioner agrees with the Government and the Eighth Circuit that Comparato was correctly decided. The critical fact in Petitioners' view is that notwithstanding the peculiarities of New York law, the disclaimer there was executed seven years after the date of death of the decedent involved.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully Submitted,

Daniel M. Traylor
Counsel of Record
Law Office of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330

Attorney for the Petitioners

APPENDIX

26 U.S.C. §6321 Lien for Taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property whether real or personal, belonging to such person.

26 U.S.C. §7426(a)(1) Civil Actions by Persons Other than Taxpayers

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Ark. Code Ann. 28-1-102(a)(10) Definitions (Heir)

(a) As used in this code, unless the context otherwise requires:

(10) "Heir" denotes a person entitled by the law of descent and distribution to the real and personal property of an intestate decedent, but does not include a surviving spouse

Ark. Code Ann. 28-1-104(a) Probate Courts

(a) The probate court shall have jurisdiction over:
(1) The administration, settlement, and distribution of estates of decedents;
(2) The probate of wills;
(3) The persons and estates of minors;
(4) Persons of unsound mind and their estates;
(5) The determination of heirship or of adoption;
(6) Concurrent with the jurisdiction of other courts, the restoration of lost wills and for the construction of wills when incident to the administration of an estate; and
(7) All such other matters as are by law provided.

Supreme Court, U.S.
FILED
JUL 9 1999
CLERK

(5)

No. 98-1101

In the Supreme Court of the United States

ROHN F. DRYE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

35pp

QUESTION PRESENTED

Whether the interest of an heir in an estate constitutes "property" or a "right[] to property" to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	5
Summary of argument	10
Argument:	
The interest of an heir in an estate constitutes "property" or a "right[] to property" to which the federal tax lien attaches under 26 U.S.C. 6321 even though the heir thereafter purports retroactively to disclaim the interest under state law	12
A. Federal law determines whether a right or interest created under state law constitutes "property" or "rights to property" to which a federal tax lien attaches under 26 U.S.C. 6321	12
B. The interest of an heir in a decedent's estate constitutes "property" or "rights to property" to which the federal tax lien attaches under 26 U.S.C. 6321	15
C. The federal tax lien that attached to petitioner's rights to property was not retroactively divested by a disclaimer of those rights under state law	20
Conclusion	29

TABLE OF AUTHORITIES

Cases:	
Adler, In re, 869 F. Supp. 1021 (E.D.N.Y. 1994)	28
Aquilino v. *United States*, 363 U.S. 509 (1960)	13
Bank One Ohio Trust Co. v. *United States*, 80 F.3d 173 (6th Cir. 1996)	13, 14, 18
Beaty v. *United States*, 937 F.2d 288 (6th Cir. 1991)	25

Cases—Continued: Page

Bradley Lumber Co. v. *Burbridge*, 210 S.W.2d 284 (Ark. 1948) 19
Brown v. *Momar, Inc.*, 411 S.E.2d 718 (Ga. Ct. App. 1991) 20
Bull v. *United States*, 295 U.S. 247 (1935) 13
Burnet v. *Harmel*, 287 U.S. 103 (1932) 14
Burton v. *Smith*, 38 U.S. (13 Pet.) 462 (1839) 11
Clark v. *Gauntt*, 161 S.W.2d 270 (Tex. Comm'n App. 1942) 22
Clark v. *Rutherford*, 298 S.W.2d 327 (Ark. 1957) 19
College Sav. Bank v. *Florida Prepaid Post-secondary Educ. Expense Bd.*, No. 98-149 (June 23, 1999) 15
Estate of Opatz, In re v. *Speldrich*, 554 N.W.2d 813 (N.D. 1996) 19, 20
Glass City Bank v. *United States*, 326 U.S. 265 (1945) 5, 12
G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977) 7
Goza v. *Fidelity & Cas. Co.*, 178 S.W.2d 498 (Ark. 1944) 21
Healy v. *Commissioner*, 345 U.S. 278 (1953) 11, 27
Jewett v. *Commissioner*, 455 U.S. 305 (1982) 10, 16, 18, 22, 24
Kimura, In re, 969 F.2d 806 (9th Cir. 1992) 14, 17
Leggett v. *United States*, 120 F.3d 592 (5th Cir. 1997) 8, 22, 23
Little v. *United States*, 704 F.2d 1100 (9th Cir. 1983) 17
Mapes v. *United States*, 15 F.3d 138 (9th Cir. 1994) 8, 23
Marshall v. *Dossett*, 20 S.W. 810 (Ark. 1892) 23
Phelps v. *United States*, 421 U.S. 330 (1975) 25
Randall v. *H. Nakashima & Co.*, 542 F.2d 270 (5th Cir. 1976) 14

Cases—Continued: Page

Rodriguez v. *Escambron Dev. Corp.*, 740 F.2d 92 (1st Cir. 1984) 28
Scranton v. *Wheeler*, 179 U.S. 141 (1900) 15
Shades Ridge Holding Co. v. *United States*, 888 F.2d 725 (11th Cir. 1989), cert. denied, 494 U.S. 1027 1027 (1990) 7
St. Louis Union Trust Co. v. *United States*, 617 F.2d 1293 (8th Cir. 1980) 18
Terwilliger's Catering Plus, Inc., In re, 911 F.2d 1168 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991) 17
Tinari v. *United States*, 78 A.F.T.R.2d (RIA) 96-6381 (E.D. Pa. 1996) 28
21 West Lancaster Corp. v. *Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986) 14, 17
United States v. *Bess*, 357 U.S. 51 (1958) 11, 13, 14, 25, 29
United States v. *Comparato*, 22 F.3d 455 (2d Cir. 1993), cert. denied, 513 U.S. 986 (1994) 27, 28
United States v. *Irvine*, 511 U.S. 224 (1994) 11, 24, 25, 27
United States v. *McDermott*, 507 U.S. 447 (1993) 5
United States v. *Mitchell*, 403 U.S. 190 (1971) 11, 14, 24, 25-26, 29
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) ..... *passim*
United States v. *Rodgers*, 461 U.S. 677 (1983) 11, 13, 14, 20, 25, 29
United States v. *Security Trust & Sav. Bank*, 340 U.S. 47 (1950) 12, 25, 27
United States v. *Solheim*, 71A A.F.T.R.2d (RIA) 93-4153 (D. Neb. 1990), aff'd on other grounds, 953 F.2d 379 (8th Cir. 1992) 28
United States v. *Stonehill*, 83 F.3d 1156 (9th Cir.), cert. denied, 519 U.S. 992 (1996) 17

Constitution and statutes: Page

U.S. Const.:
Amend. V (Takings Clause) 15
Amend. XIV 15
Internal Revenue Code (26 U.S.C.):
§§ 2001-2704 (1994 & Supp. III 1997) 25
§ 2518 25
§ 6321 ..... *passim*
§ 6322 ..... 2, 5
§ 6331(a) 2
§ 6334 ..... 3, 9, 28, 29
§ 6334(a) 28
§ 6334(c) 9, 28
§ 7426 7
11 U.S.C. 541(a)(5) 27
11 U.S.C. 549 27
Ark. Code Ann. (Michie 1987):
§ 28-1-102 21
§ 28-2-101 6
§ 28-2-102 19
§ 28-2-108 ..... 6, 7, 24
§ 28-9-203 6
§ 28-9-203(c) 17, 21
§ 28-9-214 6
§ 28-48-105 21
§ 28-53-101 21
§ 28-53-102 21
§ 28-53-110 21
N.Y. Est. Powers & Trusts Law § 2-1.11(d) (McKinney 1998) 27

Miscellaneous:

4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* (1981) 20
Black's Law Dictionary (rev. 4th ed. 1968) 16
38A C.J.S. (1996) 23
W. Elliot, *Federal Tax Collections, Liens, and Levies* (2d ed. 1999 Cum. Supp. No. 1) 27

Miscellaneous—Continued: Page

A. Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587 (1989) 27
H.R. Rep. No. 708, 72d Cong., 1st Sess. (1932) 16
S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839 (1995) 15
J. Pennell, *Recent Wealth Transfer Tax Developments*, in *Sophisticated Estate Planning Technique* (A.L.I.-A.B.A. Continuing Legal Educ. 1997) 26
W. Plumb, Jr., *Federal Tax Liens* (3d ed. 1972) 14
Restatement of Property (1936) 16, 17
M. Saltzman, *IRS Practice and Procedure* (2d ed. 1991) 20
S. Rep. No. 665, 72d Cong., 1st Sess. Pt. 1 (1932) 16

In the Supreme Court of the United States

No. 98-1101

ROHN F. DRYE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 152 F.3d 892. The orders of the district court (Pet. App. 19a-24a, 25a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. The petition for a writ of certiorari was filed on November 16, 1998 (a Monday), and was granted on April 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. 6322 provides:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

3. 26 U.S.C. 6331(a) provides, in relevant part:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien

> provided in this chapter for the payment of such tax.

4. 26 U.S.C. 6334 (1994 & Supp. III 1997) provides, in relevant part:

> (a) Enumeration
>
> There shall be exempt from levy –
>
> (1) * * * Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;
>
> (2) * * * So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;
>
> (3) * * * So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value.
>
> (4) * * * Any amount payable to an individual with respect to his unemployment * * * under an unemployment compensation law * * * .
>
> (5) * * * Mail, addressed to any person, which has not been delivered to the addressee.
>
> (6) * * * Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a

person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll * * * and annuities based on retired or retainer pay under chapter 73 or title 10 of the United States Code.

(7) * * * Any amount payable to an individual as workmen's compensation * * * under a workmen's compensation law * * * .

(8) * * * If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) * * * Any amount payable to or received by an individual as wages or salary for personal services * * * to the extent that the total of such amounts * * * does not exceed the applicable exempt amount determined under subsection (d).

(10) * * * Any amount payable to an individual as a service-connected * * * disability benefit * * * .

(11) * * * Any amount payable to an individual as a recipient of public assistance under [specified federal and state programs].

(12) * * * Any amount payable to a participant under the Job Training Partnership Act * * * .

(13) * * * Except to the extent provided in subsection (e), the principal residence of the taxpayer * * * .

* * * * *

(c) Notwithstanding any other law of the United States * * * , no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

STATEMENT

1. Prior to June 1991, the Internal Revenue Service assessed income taxes and various penalties against petitioner Rohn Drye.[1] Because petitioner failed to pay these assessments, the Service filed notices of tax lien upon "all property and rights to property" belonging to him (26 U.S.C. 6321). Pet. App. 3a. The federal tax lien arises on all "property and rights to property" of the taxpayer "at the time the assessment is made" and continues in existence "until the liability for the amount so assessed * * * is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322.[2]

---

[1] All references in this brief to "petitioner" are to Rohn Drye.

[2] The federal tax lien that arises under Section 6321 applies not only to property in which the taxpayer already has an interest but also to "all property and rights to property" thereafter acquired by the taxpayer. See, *e.g.*, *United States* v. *McDermott*, 507 U.S. 447, 448 (1993); *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

In August 1994, petitioner's mother died intestate, leaving an estate with a total value of approximately $233,000 to petitioner as her sole legal heir.[3] At the time of his mother's death, petitioner was insolvent and owed the government approximately $325,000 on the unpaid tax assessments for which notices of outstanding liens had been filed. Pet. App. 3a, 22a.

Because he was the "sole surviving heir" (C.A. App. 50), petitioner was appointed administrator of his mother's estate on August 17, 1994. See note 3, *supra*. In February 1995, however, petitioner executed and filed in the probate court an instrument entitled "Disclaimer and Consent" in which he disclaimed his entire interest in his mother's estate. Pet. App. 3a, 21a. Pursuant to that disclaimer, the estate passed by operation of state law to petitioner's daughter, Theresa Drye. *Id.* at 21a.[4] Petitioner's daughter concurrently established

[3] Under Arkansas law, upon the death of an intestate, the estate passes "[f]irst, to the children of the intestate." Ark. Code Ann. § 28-9-214 (Michie 1987). As the "Petition for Appointment of Administrator" filed by petitioner in the Arkansas probate court states, his interest in his mother's estate was "that of sole surviving heir" (C.A. App. 50).

[4] Under Arkansas law, upon the death of the decedent intestate, real property passes immediately to the decedent's heirs and personal property passes to the personal representative for distribution to the heirs. Ark. Code Ann. § 28-9-203 (Michie 1987); see Pet. App. 32a-33a. An heir may disclaim his interest in the estate by filing a written disclaimer. Ark. Code Ann. § 28-2-101 (Michie 1987); see Pet. App. 30a-31a. If such a disclaimer is filed, state law creates a legal fiction that the disclaimant predeceased the decedent, with the result that the disclaimant's share of the estate passes to the next person in line to receive that share. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a. By filing such a disclaimer, an heir may prevent his state-law creditors from obtaining payment from that share of the estate. Ark. Code Ann. § 28-2-108 (Michie 1987); see Pet. App. 32a.

a trust (The Drye Family 1995 Trust), the beneficiaries of which were petitioner, his wife, and his daughter. *Id.* at 3a-4a, 22a. Petitioner resigned as administrator of the estate and his daughter replaced him. *Id.* at 3a, 22a. The state probate court thereupon authorized the distribution of the estate property to petitioner's daughter, who used the property to fund the trust. *Id.* at 3a-4a.

After petitioner revealed his beneficial interest in this family trust during negotiations with the Internal Revenue Service in 1995, the government filed a notice of tax lien against the trust, as Drye's nominee. Pet. App. 4a, 21a.[5] The Service also levied upon accounts held in the trust's name at an investment company. The account proceeds of $134,004.33 were paid to the government pursuant to the levy. *Id.* at 4a, 23a.

2. On May 1, 1996, the trust filed a wrongful levy suit against the United States in federal district court under 26 U.S.C. 7426. The trustee contended that, because of the disclaimer of petitioner's interest in the estate, petitioner never held an interest in that estate to which the federal tax liens could attach. Pet. App. 2a, 4a, 26a. The United States filed a counterclaim against petitioner, the trust, the trustee, Sue Drye (petitioner's wife), and Theresa Drye (petitioner's daughter), seeking to reduce the assessments against petitioner to judgment and to foreclose on its tax liens (C.A. App. 6-7, 64, 67-71).

[5] Property held in the name of a nominee or alter ego of a taxpayer is subject to levy for the collection of the taxpayer's tax liability. *Shades Ridge Holding Co.* v. *United States*, 888 F.2d 725, 728 (11th Cir. 1989) (citing *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977)), cert. denied, 494 U.S. 1027 (1990).

The district court granted the government's motion for summary judgment. Pet. App. 19a-24a. The court concluded that petitioner "obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens properly attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens." *Id.* at 23a. In response to the trustee's motion for reconsideration, the court emphasized that federal law determines the proper application of federal tax liens and that "a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens." *Id.* at 26a.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court explained that, under the federal tax lien statute, the court is to look to state law to determine "whether a given set of circumstances creates a right or interest" (*id.* at 12a) and then look to federal law to determine whether that right or interest constitutes "property" or "rights to property" (26 U.S.C. 6321) to which the federal tax lien attaches (Pet. App. 12a-13a, citing *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985)). See also Pet. App. 6a-8a.[6] The court held that an interest in property under state law constitutes "property" or "rights to property" under federal law (to which the federal tax lien attaches under 26 U.S.C. 6321) if the interest is transferable and has pecuniary value (Pet. App. 7a, 14a).

[6] The court stated (Pet. App. 12a) that it parted company with the Fifth Circuit's decision in *Leggett* v. *United States*, 120 F.3d 592 (1997), and the Ninth Circuit's decision in *Mapes* v. *United States*, 15 F.3d 138 (1994), because those cases erroneously apply state law, rather than federal law, in ascertaining whether the interest possessed by the taxpayer constitutes "property" or "rights to property" under Section 6321.

The court of appeals concluded that petitioner's right to inherit the property of his mother's estate satisfied this standard because that right was transferable and had pecuniary value (Pet. App. 8a, 14a). Petitioner's interest thus represented "property" or "rights to property" for purposes of the federal tax lien statute, and the tax liens filed against petitioner attached to his interest in his mother's estate. *Id.* at 13a.

The court explained that petitioner's subsequent disclaimer of his interest under state law could not extinguish the federal liens that previously attached to that interest. The fact that, for purposes of state law, the disclaimer is treated as if it relates back to the date of the decedent's death does not mean that, at the time the lien attached, petitioner held no "property" or "rights to property" in the estate. Because the federal liens validly attached to that property *before* the disclaimer was made, petitioner's subsequent efforts to dispose of his interest could not defeat the federal lien. Title to the property transferred to the trust remained subject to the preexisting federal tax lien, and the levy on the assets held in the name of the trust to satisfy petitioner's debt was therefore not wrongful. Pet. App. 4a-5a, 17a-18a.

The court of appeals noted that 26 U.S.C. 6334 manifests a specific intent that the federal tax lien apply even to interests in "property" and "rights to property" that are validly disclaimed under state law. That statute establishes a comprehensive list of property interests that are exempt from the federal tax levy, and "[p]roperty or rights to property disclaimed under state law are not included in the list of exempt property" (Pet. App. 16a). Since 26 U.S.C. 6334(c) expressly provides that "no property or rights to property shall be exempt from levy other than the property specifically

made exempt by [26 U.S.C. 6334(a)]," the fact that Congress did *not* "exclude property exempt from levy under state law" in the list of interests that are exempt from levy under federal law "is indicative of its intention that such property be subject to federal levy" (Pet. App. 16a).

SUMMARY OF ARGUMENT

1. Under Section 6321 of the Internal Revenue Code, the United States has a lien "upon all property and rights to property" of a delinquent taxpayer. 26 U.S.C. 6321. That lien reaches "every interest in property that a taxpayer might have" (*United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985)) and therefore attached to the rights that petitioner acquired in his mother's estate.

Whether an interest that arises under state law constitutes "property" or "rights to property" for purposes of the federal tax lien is determined solely as "a matter of federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. Under the applicable federal standard, the interest of an heir in an estate constitutes "property" or "rights to property" because that interest is "protected by law," is transferable and has "an exchangeable value." See *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982). Indeed, it is well settled that such a "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725.

2. Once the federal tax lien attached to petitioner's interest in the estate, the lien could not be divested by "an indirect transfer [of that interest] effected by means of a disclaimer" (*Jewett* v. *Commissioner*, 455 U.S. at 310). The federal tax lien "cannot be extinguished * * * simply by a transfer or conveyance of the interest" (*United States* v. *Rodgers*, 461 U.S. 677, 691 n.16 (1983)), for property subject to a federal tax lien passes "cum onere." *United States* v. *Bess*, 357 U.S. 51, 57 (1958) (quoting *Burton* v. *Smith*, 38 U.S. (13 Pet.) 462, 483 (1839)). The state-law "legal fiction" under which the disclaimer has "the effect of canceling the transfer to the disclaimant *ab initio*" does not destroy the federal tax lien, for federal taxation looks to the realities of the taxpayer's rights and is not "struck blind by a disclaimer." *United States* v. *Irvine*, 511 U.S. 224, 239-240 (1994). A state-law right "to renounce or repudiate must not be misconstrued as an indication" that the taxpayer, in fact, "never owned" the property. *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971). The "retroactive * * * legal fiction * * * cannot change the 'readily realizable economic value' * * * which the[] taxpayer[] enjoyed" prior to the disclaimer. *Healy* v. *Commissioner*, 345 U.S. 278, 283 (1953). Once the federal lien attached to the taxpayer's "right to receive [the] property" of the estate, state law was "inoperative" to destroy the lien. *United States* v. *National Bank of Commerce*, 472 U.S. at 722, 725. "[I]t is of the very nature and essence of [the federal tax lien] that no matter into whose hands the property goes, it passes cum onere." *United States* v. *Bess*, 357 U.S. at 57.

ARGUMENT

THE INTEREST OF AN HEIR IN AN ESTATE CONSTITUTES "PROPERTY" OR A "RIGHT[] TO PROPERTY" TO WHICH THE FEDERAL TAX LIEN ATTACHES UNDER 26 U.S.C. 6321 EVEN THOUGH THE HEIR THEREAFTER PURPORTS RETROACTIVELY TO DISCLAIM THE INTEREST UNDER STATE LAW

A. *Federal Law Determines Whether A Right Or Interest Created Under State Law Constitutes "Property" Or "Rights To Property" To Which A Federal Tax Lien Attaches Under 26 U.S.C. 6321*

Section 6321 of the Internal Revenue Code provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all property and rights to property*, whether real or personal, belonging to such person." 26 U.S.C. 6321 (emphasis added). "[T]he purpose of the federal tax lien [is] to insure prompt and certain collection of taxes due the United States from tax delinquents." *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 51 (1950). To achieve that goal, Congress employed the broadest terminology "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. 713, 720 (1985). "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945). In explaining the sweeping breadth of the statutory language, the Court has stated: "While one might not be enthusiastic about paying taxes, it is still true that 'taxes are the life-blood of government, and their

prompt and certain availability an imperious need.'" *United States* v. *National Bank of Commerce*, 472 U.S. at 733 (quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)).

"The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the [federal] tax lien could attach." *Aquilino* v. *United States*, 363 U.S. 509, 512 (1960). In addressing that threshold issue, this Court has made clear that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. Although "state law controls in determining the nature of the legal interest which the taxpayer had in the property," whether that interest is sufficient to constitute "property" or "rights to property" under Section 6321 is determined solely as a matter of federal law and "state law is inoperative" for this purpose. *Id.* at 722 (quoting *United States* v. *Bess*, 357 U.S. 51, 57 (1958)). See also *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983); *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d 173, 175-176 (6th Cir. 1996).

For example, in *United States* v. *National Bank of Commerce*, 472 U.S. at 727, the Court held that the right of a co-depositor to withdraw funds from a joint bank account was an interest in "property" or a "right[] to property" to which the federal tax lien attached even though, under state law, a creditor could not seize and exercise the co-depositor's right of withdrawal. Noting that the federal tax lien statute "relates to the taxpayer's rights to property and not to his creditor's rights," the Court held that it was improper to "remit[] the IRS to the rights only an ordinary creditor would

have under state law," for that improperly "compare[s] the government to a class of creditors to which it is superior." *Ibid.* (quoting *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 274 n.8 (5th Cir. 1976)). "[O]nce it has been determined that state law has created property interests sufficient for [the] federal tax lien to attach, state law 'is inoperative to prevent the attachment' of such liens." *United States* v. *Rodgers*, 461 U.S. 677, 683 (1983) (quoting *United States* v. *Bess*, 357 U.S. at 57).

Thus, while it is "state law [that] creates legal interests," it is "the federal statute [that] determines when and how they shall be taxed." *United States* v. *Mitchell*, 403 U.S. 190, 197 (1971) (quoting *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932)). If "federal law [were] not determinative of the [classification] of the state-created interest, states could defeat the federal tax lien by declaring an interest not to be property, even though the beneficial incidents of property belie its classification." *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992). See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d at 176 ("Federal law did not create [the taxpayer's] equitable income interest [in a spendthrift trust] but federal law must be applied in determining whether the interest constitutes 'property' for purposes of § 6321"); *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986) (although a liquor license did not constitute "property" and could not be reached by creditors under state law, it was nevertheless "property" subject to federal tax lien); W. Plumb, Jr., *Federal Tax Liens* 27 (3d ed. 1972) ("it is not material that the economic benefit to which the [taxpayer's local-law property]

right pertains is not characterized as 'property' by local law").[7]

B. *The Interest Of An Heir In A Decedent's Estate Constitutes "Property" Or "Rights To Property" To Which The Federal Tax Lien Attaches Under 26 U.S.C. 6321*

1. The terms "property" and "rights to property" as used in Section 6321 are not defined in the statute. In ordinary usage, the term "property" is a flexible concept with a meaning that varies with context, and "[n]o decision of this court has announced a rule that will embrace every case." *Scranton* v. *Wheeler*, 179 U.S. 141, 152 (1900) (Takings Clause).[8] In enacting Section

---

[7] See also S. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 859 (1995) (footnotes omitted):

> The predominance of substance over state-created labels and formalities is demonstrated by the fact that the federal tax lien attaches to economic rights and interests even if the applicable state law does not classify them as property interests. For example, in *United States v. National Bank of Commerce*, the right to withdraw money from a bank account was not called a property right by Arkansas law but nonetheless was held to be a sufficient property interest for federal tax collection purposes.

[8] For example, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, No. 98-149 (June 23, 1999), slip op. 6, the Court stated that a "civil right" to be free from competition is not a "property right" for purposes of the Fourteenth Amendment merely because that right has "pecuniary" value. *Ibid.* Instead, the Court explained that a "hallmark" of a "property" right under that Amendment is "the right to exclude others." *Id.* at 5. Although that constitutional analysis does not guide the meaning of the phrase "property or rights to property" as employed by Congress in Section 6321, we note that the interest of an heir in an estate unquestionably includes "the right to

6321, however, it is evident that Congress employed the broadest possible language "to reach every interest in property that a taxpayer might have." *United States* v. *National Bank of Commerce*, 472 U.S. at 720. When Congress uses the term "property" in this broad sense, it "reach[es] every species of right or interest protected by law and having an exchangeable value." *Jewett* v. *Commissioner*, 455 U.S. 305, 309 (1982) (quoting S. Rep. No. 665, 72d Cong., 1st Sess. Pt. 1, at 39 (1932); H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

In general use, the term "propery" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest * * * ." *Black's Law Dictionary* 1382 (rev. 4th ed. 1968). An interest in "property" thus encompasses (i) any "right" that represents "a legally enforceable claim of one person against another," (ii) any "privilege" that constitutes "a legal freedom on the part of one person * * * to do a given act," and (iii) any "power" that "is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." Restatement of Property §§ 1-3 (1936).[9]

Applying these basic principles under Section 6321, courts have routinely held that any right or interest that has "pecuniary value and is transferable" consti-

---

exclude others" from receiving that property. See, *e.g.*, Pet. App. 8a, 13a; notes 10 & 12, *infra*.

[9] An "interest" in property refers to "varying aggregates of rights, privileges, powers and immunities" or "any one of them." Restatement of Property § 5 (1936).

tutes "property" or "rights to property" for purposes of the tax lien statute. See *United States* v. *Stonehill*, 83 F.3d 1156, 1159-1160 (9th Cir.) (chose-in-action is subject to federal tax lien), cert. denied, 519 U.S. 992 (1996); *In re Kimura*, 969 F.2d at 810-811 (liquor license is subject to federal tax lien); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-1172 (6th Cir. 1990) (same), cert. denied, 501 U.S. 1212 (1991); *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1986) (same); *Little* v. *United States*, 704 F.2d 1100, 1104-1106 (9th Cir. 1983) (state-law right of redemption is subject to federal tax lien because it "represents an economic asset in the sense that it has pecuniary value and is transferable").

2. a. Under these standards, the court of appeals correctly concluded (Pet. App. 8a) that the rights that petitioner acquired in his mother's estate at the time of her death constituted "property" or "rights to property" to which the federal tax lien attaches. As petitioner acknowledges, at the time of his mother's death, he was "the party entitled to inherit the estate" (C.A. App. 87). He thus acquired a "right" to receive the entire value of the estate (less its administrative expenses) and a "power" to compel the transfer of that property to him. See Restatement of Property, *supra*, §§ 1-3; Pet. App. 8a. Those property interests were protected by law and plainly had a substantial pecuniary value. *Id.* at 3a, 8a.[10]

---

[10] Under the Arkansas law of intestate succession, real estate passes immediately to the heirs (subject to the administrator's right to sell it if cash is needed to pay claims or legacies) while personalty passes to the administrator for eventual distribution to the heirs. Ark. Code Ann. § 28-9-203(c) (Michie 1987). In both contexts, the heir has an enforceable right to receive the property or its equivalent (Pet. App. 8a, 13a). The fact that actual transfer

It is well established that a "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725 (quoting *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (8th Cir. 1980)). Because the federal tax lien attaches to "whatever rights the taxpayer himself possesses" (*ibid.*), the lien attached to petitioner's valuable right to receive his mother's estate as her sole legal heir.

b. The broad concept of "property" that Congress has employed in the Internal Revenue Code requires only that the "property" or "right[] to property" be an enforceable interest that has pecuniary value. See *Jewett* v. *Commissioner*, 455 U.S. at 309; page 16, *supra*. It is not necessary to that broad concept for such an interest also to be freely transferable. Indeed, many types of recognized "property" interests are *not* transferable. For example, an interest in a spendthrift trust is commonly understood to constitute a "property" interest even though the beneficiary may not transfer that interest to third parties. See, *e.g.*, *Bank One Ohio Trust Co.* v. *United States*, 80 F.3d at 176. As the court explained in the *Bank One* case (*ibid.*):

> [W]hen Congress says, as it has done in § 6321, that an unpaid tax "shall" constitute a lien upon "all" of a delinquent taxpayer's property or rights to property, it follows that the tax is a lien both on

---

of personal property may be delayed until the end of the period of administration does not alter the conclusion that the heir's right is a valuable "right[] to property" within the meaning of Section 6321. See *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (8th Cir. 1980) (the right to receive property in the future "is itself a property right * * * even though the right to payment * * * has not matured").

> property that is alienable under state law and on property that is not.

It is, in any event, unnecessary for the Court to address in the present case whether transferability is a necessary component of the concept of "property" or "rights to property" under Section 6321. This is because, as the court of appeals correctly held (Pet. App. 8a), petitioner's valuable right to receive the property of the estate plainly *is* transferable under Arkansas law. A prospective heir may validly assign his expectancy in an estate under Arkansas law, and the assignment will be enforced when the expectancy ripens into a present estate. *Clark* v. *Rutherford*, 298 S.W.2d 327, 329 (Ark. 1957); *Bradley Lumber Co.* v. *Burbridge*, 210 S.W.2d 284, 288 (Ark. 1948). Arkansas law provides staunch protection for such an assignment from an unreliable heir by providing that the heir's right to disclaim an estate is barred not only by acceptance of the property but also by any "assignment, conveyance, encumbrance, pledge, or transfer of the property or interest." Ark. Code Ann. § 28-2-102 (Michie 1987).[11]

---

[11] Although the issue was not raised or addressed in this case, it appears that this protection from disclaimers provided by state law to any "encumbrance" on the heir's interest (Ark. Code Ann. § 28-2-102 (Michie 1987)) would not be of assistance to any "third party," such as the United States. The courts that have addressed this issue have concluded "that a lien created by third parties is not an 'encumbrance' under the statute which bars the debtor's right to renounce." *In re Estate of Opatz* v. *Speldrich*, 554 N.W.2d 813, 816 (N.D. 1996) (applying the uniform statutory provisions also applicable in Arkansas). To avoid an interpretation of the statute that would make it largely ineffective, these courts have concluded that only an "encumbrance created by the disclaimant"—and not

c. When petitioner's mother died, leaving him as her sole legal heir, petitioner thus acquired an enforceable legal right that was valuable and transferable. That right constituted an interest in "property" and a "right[] to property" to which the federal tax lien attached. At the moment that the right arose, the United States "step[ped] into the taxpayer's shoes" and "acquire[d] whatever rights the taxpayer himself possesse[d]." *United States* v. *National Bank of Commerce*, 472 U.S. at 725 (quoting *United States* v. *Rodgers*, 461 U.S. at 691 n.16 (quoting 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.4, at 111-102 (1981))). See also M. Saltzman, *IRS Practice and Procedure* ¶ 14.07[1], at 14-35 (2d ed. 1991).

C. *The Federal Tax Lien That Attached To Petitioner's Rights To Property Was Not Retroactively Divested By A Disclaimer Of Those Rights Under State Law*

After the federal tax lien attached to petitioner's "property" and "rights to property," he disclaimed his right to the estate and thereby transferred that right to his daughter. She thereafter received and transferred the underlying property to the family trust, in which petitioner possesses a life estate (Pet. App. 17a). The court of appeals correctly concluded that petitioner's disclaimer did not defeat the previously-attached federal tax lien, for "once a lien has attached to an interest in property, the lien cannot be extinguished * * * simply by a transfer or conveyance of the interest." *United States* v. *Rodgers*, 461 U.S. at 691 n.16.

---

one created by "third parties"—would bar a disclaimer. *Ibid.* See *Brown* v. *Momar, Inc.*, 411 S.E.2d 718, 721 (Ga. Ct. App. 1991).

1. Petitioner errs in contending that, because of his valid state-law disclaimer, he never acquired any interest in his mother's estate. He argues that, on her death, he acquired "nothing more than a personal right of decision as to whether to accept or reject the gift of inheritance offered" (Pet. Br. 13). He contends that such a "personal right of decision" is not "property" or a "right[] to property" to which the federal tax lien attached under Section 6321 because it "had no pecuniary value and was not transferable" (*ibid.*).

It is well established, however, that the "right to receive property is itself a property right" to which the federal tax lien attaches. *United States* v. *National Bank of Commerce*, 472 U.S. at 725. In particular, the power that petitioner held to compel the delivery of that valuable property to himself or to transfer that property to another plainly constitutes a "right[] to property" within the broad scope of Section 6321.[12] As

---

[12] Far from possessing only a "personal right of decision," petitioner held a broad spectrum of rights and interests under state law. In particular, petitioner had a protected and enforceable right to receive the assets of his mother's estate, less the costs of administration. See Ark. Code Ann. § 28-9-203(c) (Michie 1987). That right was enforceable by suit in state court. See, *e.g.*, *id.* §§ 28-1-102 (interested persons include heirs, devisees, and others having property right, interest in, or claim against an estate), 28-48-105 (interested persons may petition for removal of personal representative of estate for, *inter alia*, mismanagement or dereliction of duty), 28-53-101 (persons claiming interest in property of decedent as heirs or distributees can petition probate court for administration of estate to determine their respective interests in estate), 28-53-102 (partial distributions), 28-53-110 (suits to recover improper distributions); see *Goza* v. *Fidelity & Cas. Co.*, 178 S.W.2d 498 (Ark. 1944). The rights possessed by petitioner were also transferable by assignment or by disclaimer. See Pet. App. 8a.

the court of appeals correctly held, "[u]nder Arkansas law the right to inherit has pecuniary value * * * and is transferable" and therefore "is property or a right to property" to which the federal tax lien attached (Pet. App. 8a, 17a). See page 19, *supra*.

The manifest flaw in petitioner's reasoning is that it incorrectly assumes that the characterization of the interest for purposes of state law controls in determining whether the interest constitutes "property" or a "right[ ] to property" under Section 6321. The Fifth Circuit made that same error in *Leggett* v. *United States*, 120 F.3d 592 (1997), in holding that the federal tax lien did not attach to the interest of the taxpayer in his aunt's estate because the "right of decision" whether to accept the estate "was not, itself, a property right *under Texas law*." *Id.* at 596 (emphasis added). In reaching that conclusion, the Fifth Circuit relied on the holding of a Texas appellate court that the state-law "'relation back' doctrine is based on the principle that a bequest or gift is nothing more than an offer which can be accepted or rejected." *Id.* at 595.[13]

Even if that narrow characterization of the nature of the state-law interest were correct (which it is not, see notes 10 & 12, *supra*), an "offer which can be accepted or rejected" is nonetheless itself an interest in "property" or a "right[] to property" for purposes of Section 6321. It is a "species of right or interest protected by law and having an exchangeable value." *Jewett* v. *Commissioner*, 455 U.S. at 309; pages 16, 18, *supra*.

[13] In Texas, as in Arkansas, however, the right of a prospective heir to receive property from an estate is assignable, and the assignee may enforce the assignment upon the death of the ancestor. See *Clark* v. *Gauntt*, 161 S.W.2d 270, 272 (Tex. Comm'n App. 1942); page 19, *supra*.

Whether the state courts would describe such a valuable, transferable interest as a "property" interest *for purposes of state law* is not determinative in applying the federal tax lien. Although state law determines "the nature of the legal interest which the taxpayer had," whether that interest is sufficient to constitute "property" or "rights to property" under Section 6321 is determined solely as a matter of federal law and "state law is inoperative" for this purpose. *United States* v. *National Bank of Commerce*, 472 U.S. at 727; page 13, *supra*.[14]

Petitioner errs in relying (Pet. Br. 9) on the fact that, at common law, a "gift" creates no enforceable right until it is accepted and delivered. See *Marshall* v. *Dossett*, 20 S.W. 810, 811 (Ark. 1892) ("The promise to make a gift of chattels * * * confers no title or right of possession to the property promised, and affords no ground for a remedy against the promisor, by replevin or otherwise."); 38A C.J.S. *Gifts* § 16 (1996). Unlike an incomplete gift, the prospective interest of an heir in an estate is an enforceable and transferable right that vests immediately upon the death of the decedent and remains in existence until it is fulfilled (by the receipt of the property of the estate) or is transferred by assign-

[14] The Fifth Circuit accordingly erred in *Leggett* in concluding that "state law determines whether a taxpayer has a property interest to which a federal lien may attach" and that "Section 6321 adopts the state's definition of property interest." 120 F.3d at 594, 597. The Ninth Circuit similarly erred in *Mapes* v. *United States*, 15 F.3d 138, 140 (1994), in holding that a timely renunciation under state law retroactively "had the effect of preventing [the taxpayer] from acquiring any interest in the estate." In both of these cases, the taxpayers held vested, legally enforceable rights to receive or transfer the property of the estate at the time the tax lien attached.

ment or by an "indirect transfer, effected by means of a disclaimer" (*Jewett* v. *Commissioner*, 455 U.S. at 310). Because this legally protected interest in the decedent's estate is valuable and transferable, it constitutes a "right[ ] to property" to which the federal tax lien attaches under Section 6321.

2. a. Petitioner incorrectly asserts that the federal tax lien is retroactively destroyed by the legal fiction under state law that a disclaimer "relates back for all purposes to the date of death of the decedent" (Pet. Br. 12 (quoting Ark. Code Ann. § 28-2-108 (Michie 1987))). A state-law "legal fiction" of a retroactive renunciation of an interest in property "does not bind the federal collector" (*United States* v. *Mitchell*, 403 U.S. at 204). Instead, as this Court stated in *United States* v. *Irvine*, 511 U.S. at 239, "[c]ases like * * * this one illustrate * * * why it is that state property transfer rules do not translate into federal taxation rules." In *Irvine*, after a gift had been fully executed by delivery of the property in trust, the taxpayer had disclaimed her beneficial interest under the provisions of state law. Under "state property rules," the taxpayer's subsequent disclaimer was treated as "having the effect of canceling the transfer to the disclaimant *ab initio*." *Ibid.* This Court held, however, that the relation back of the disclaimer under state law did not mean that, for purposes of federal law, the taxpayer never held a "property" interest in the assets of the trust. *Ibid.* Federal law is not "struck blind" by the State's "legal fiction" of a retroactive disclaimer. *Id.* at 240. Instead, for purposes of federal law, the state-law disclaimer simply operates as an "indirect transfer" of the "property" to others. *Id.* at 233. Accord, *Jewett* v. *Commissioner*, 455 U.S. at 310.

The Court has consistently held that the federal tax lien "cannot be extinguished * * * simply by a transfer or conveyance of the interest." *United States* v. *Rodgers*, 461 U.S. at 691 n.16. Any such transfer of "property" or "rights to property" made (as in this case) *after* the tax lien has attached cannot undermine the effectiveness of the lien, for property subject to a federal tax lien passes "cum onere." *United States* v. *Bess*, 357 U.S. at 57. See also *Phelps* v. *United States*, 421 U.S. 330, 334-335 (1975); *Beaty* v. *United States*, 937 F.2d 288, 290-292 (6th Cir. 1991).

"Once it has been determined that state law creates sufficient interests" for "property" or "rights to property" to exist, state law becomes "inoperative, and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (quoting *United States* v. *Bess*, 357 U.S. at 56-57) (internal brackets and quotation marks omitted). The "legal fictions" adopted under state law and, in particular, the state-law "doctrine of relation back" may not be applied "to destroy the realities of the situation" (*United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 50 (1950)). "Congress had not meant to incorporate state-law fictions as touchstones of taxability"; instead, federal taxation looks to the realities of the taxpayer's rights. *United States* v. *Irvine*, 511 U.S. at 240.[15] As this Court held in *United States* v.

---

[15] Certain types of "qualified" disclaimers are given effect solely for purposes of the federal wealth-transfer taxes (Subtitle B, §§ 2001-2704 of the Internal Revenue Code (1994 & Supp. III 1997)) under Section 2518 of the Code, 26 U.S.C. 2518. The federal tax lien is part of the tax collection provisions contained in Subtitle

Mitchell, 403 U.S. 190 (1971), a state-law right "to renounce or repudiate must not be misconstrued as an indication" that the taxpayer, in fact, "never owned" the property. *Id.* at 204.[16]

The courts below thus correctly concluded that "a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens" (Pet. App. 26a; see *id.* at 17a). It is immaterial that the "legal fiction" under the state-law doctrine of relation-back precludes any recovery for private creditors against the property. The federal tax lien "relates to the taxpayer's rights to property and not to his creditor's rights." *United States* v. *National Bank of Commerce*, 472 U.S. at 727. The "retroactive * * * legal fiction * * * cannot change the 'readily realizable

---

F, however, rather than the substantive gift and estate tax provisions of Subtitle B:

> The fact that a qualified disclaimer by an estate beneficiary is deemed to relate back to the decedent's death for state property law or federal gift tax purposes is not sufficient to preclude a federal tax lien for the disclaimant's delinquent taxes from attaching to the disclaimed property as of the moment of the decedent's death. * * * [T]he qualified disclaimer provision in § 2518 only applies for purposes of Subtitle B and the lien provisions are in Subtitle F. As a result, once the lien attached, it could not be defeated by the disclaimant's subsequent attempt to protect the property from the federal government's claim.

J. Pennell, *Recent Wealth Transfer Tax Developments*, in *Sophisticated Estate Planning Technique* 69, 117-118 (A.L.I.-A.B.A. Continuing Legal Educ. 1997).

[16] In *United States* v. *Mitchell*, 403 U.S. at 201-202, the Court held that, although a wife's renunciation of a marital interest was treated as retroactive under state law, that state-law fiction is not operative in determining the wife's liability for tax on her share of the community income realized before the renunciation.

economic value' * * * which the[] taxpayer[] enjoyed" prior to the disclaimer. *Healy* v. *Commissioner*, 345 U.S. 278, 283 (1953).[17] As a "matter of federal law" (*United States* v. *National Bank of Commerce*, 472 U.S. at 727), the federal tax lien attached to petitioner's interest in that "realizable economic value" at the time it arose. Petitioner's subsequent renunciation and transfer of that interest to his daughter cannot destroy either "the realities of the situation" or the federal tax lien (*United States* v. *Security Trust & Sav. Bank*, 340 U.S. at 50). As the Second Circuit held in *United States* v. *Comparato*, 22 F.3d 455, 457 (1993), cert. denied, 513 U.S. 986 (1994), "once the federal liens attached [to the property right, the taxpayers'] subsequent renunciations pursuant to state law were not effective against the federal liens."[18] "[T]he priority of the tax lien is governed by federal law, and federal law makes no

---

[17] Taxation is not the only area in which Congress has not recognized state-law disclaimers. Under Sections 541(a)(5) and 549 of the Bankruptcy Code, the bankruptcy trustee may avoid post-petition disclaimers. 11 U.S.C. 541(a)(5), 549. See A. Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587, 589 (1989).

[18] In *Comparato*, the Second Circuit held that the federal tax lien was not defeated by a subsequent renunciation of a property interest that was "retroactive to the creation" of the interest under New York law. N.Y. Est. Powers & Trusts Law § 2-1.11(d) (McKinney 1998). That holding draws direct support from this Court's decision in *Irvine*. See W. Elliot, *Federal Tax Collections, Liens, and Levies* ¶ 9.09[3][d][ii], at S9-10 to S9-11 (2d ed. 1999 Cum. Supp. No. 1) (footnotes omitted):

> In *Irvine* * * * [t]he Supreme Court reaffirmed the principle followed in *Comparato* that "although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." The Court then applied federal law in determining the validity of Irvine's disclaimer for federal gift tax purposes.

provision for a subordination by use of a legal fiction." *Rodriguez* v. *Escambron Dev. Corp.*, 740 F.2d 92, 98 (1st Cir. 1984).[19]

b. The conclusion that a state-law disclaimer cannot retroactively destroy an existing tax lien is reinforced by the provisions of Section 6334 of the Code. That Section establishes a comprehensive list of property interests that are exempt from the federal tax levy (26 U.S.C. 6334(a)), and then specifies that "no property or rights to property shall be exempt from levy other than the property made exempt" in that statute (26 U.S.C. 6334(c)). As the court of appeals correctly concluded in this case, the fact that "property or rights to property disclaimed under state law" are *not* included in the list of interests exempt from levy under this statute indicates "that such property [is] subject to federal levy" (Pet. App. 16a). Accord, *United States* v. *Comparato*, 22 F.3d at 458:

> [O]nce state law provided [the taxpayers] with a vested interest * * * , federal law controlled whether their interests were exempt from levy by the United States. * * * Since § 6334(a) does not provide an exemption for [the taxpayers'] interests in their son's estate, the federal tax liens are effective against their interests despite their subsequent renunciations pursuant to [state law].

[19] Other courts have similarly concluded that a state-law disclaimer cannot "relate back" to defeat a previously-attached federal tax lien. See, *e.g.*, *In re Adler*, 869 F. Supp. 1021, 1026-1028 (E.D.N.Y. 1994); *Tinari* v. *United States*, 78 A.F.T.R.2d (RIA) 96-6381 (E.D. Pa. 1996); *United States* v. *Solheim*, 71A A.F.T.R.2d (RIA) 93-4153 (D. Neb. 1990), aff'd on other grounds, 953 F.2d 379 (8th Cir. 1992).

In *United States* v. *Mitchell*, 403 U.S. at 204, this Court explained that a state-law renunciation of a property interest that is effective retroactively to make that interest exempt from creditors under state law "does not bind the federal collector." Instead, "[f]ederal law governs what is exempt from federal levy." *Ibid.* The Court held in *Mitchell* that the text of Section 6334 "is specific and * * * clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." *Id.* at 205. To the contrary, "[t]he fact that * * * Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of liens under [Section 6321]." *United States* v. *Bess*, 357 U.S. at 57. Accord, *United States* v. *Rodgers*, 461 U.S. at 701 (it would "frustrate the policy of the statute [to] read[] such an exception into it").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID I. PINCUS
ANTHONY T. SHEEHAN
Attorneys

JULY 1999